# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1902~~ 1903. 1904.

No. ~~685~~ 269. 24.

THE NORTHERN PACIFIC RAILWAY COMPANY, APPELLANT,

*vs.*

THE AMERICAN TRADING COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED APRIL 14, 1903.

(18,893.)

(18,893.)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1902.

No. 665.

THE NORTHERN PACIFIC RAILWAY COMPANY, APPELLANT,

*vs.*

THE AMERICAN TRADING COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

THE FARMERS' LOAN AND TRUST COMPANY, Complainant-Appellee,
*v.*
THE NORTHERN PACIFIC RAILROAD COMPANY ET AL., Defendants-Appellees, The American Trading Company, Intervenor-Appellant.

*Transcript of Record.*

Appeal from the circuit court of the United States for the southern district of New York.

Printed under the direction of the clerk.
[Stamped:] United States circuit court of appeals, second circuit. Filed Mar. 4, 1902. William Parkin, clerk.

1 Circuit Court of the United States for the Southern District of New York.

THE FARMERS' LOAN AND TRUST COMPANY
*against*
NORTHERN PACIFIC RAILROAD COMPANY ET AL.

Please take notice that upon the annexed petition and all the pleadings and proceedings in the above entitled cause, application will be made to the circuit court of the United States for the southern district of New York, at the rooms of the said court at the post office building in the city of New York, on the 16th day of April, 1897, at eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard, for leave to file the annexed petition of the American Trading Company, and for the enforcement of its claim therein set forth against the property purchased by the Northern Pacific Railway Company under the decree in the above entitled cause, and similar decrees entered in other jurisdictions in accordance with the provisions of said decree, and with the usual practice of said court in relation to claims of similar character, and for such other or further order or relief as to the court may seem equitable and proper.

Dated New York, March 26th, 1897.

Yours, &c., HOWARD VAN SINDEREN,
*Solicitor for American Trading Company, Petitioner.*

To Northern Pacific Railway Company.

2 Circuit Court of the United States for the Southern District of New York.

THE FARMERS' LOAN AND TRUST COMPANY
*against*
NORTHERN PACIFIC RAILROAD COMPANY ET AL.

To the honorable the judges of the United States circuit court for the southern district of New York:

The petition of the American Trading Company, respectfully shows:

First. That your petitioner is a corporation duly created, organized and existing under and by virtue of the laws of the State of Connecticut, having its principal office and doing business in the city of New York, in the State of New York.

Second. That on or about August 15, 1893, P. B. Winston, The Farmers' Loan and Trust Company and others, as complainants, filed a bill of complaint, in equity, in the circuit court of the United States for the southern district of New York (as well as in the circuit courts of the United States in certain other districts) against the Northern Pacific Railroad Company, a corporation duly created, organized and existing under the laws of the United States, and that by orders entered on or about that day the said court and such other courts duly appointed Thomas F. Oakes, Henry C. Payne and Henry C. Rouse as receivers of said company and its property, and the said receivers duly qualified as such. That on and subsequently to the

3 18th day of October, 1893, the above named complainant, The Farmers' Loan and Trust Company, filed its bills of complaint against the Northern Pacific Railroad Company and others, in certain of the circuit courts of the United States, including the above named court, to foreclose certain mortgages on the property of the said railroad company, and that said courts duly entered orders thereon consolidating said two suits, and extending the receivership established in the suit first above mentioned to the consolidated cause and directing that the said consolidated cause proceed under the title of said foreclosure suit.

Third. That as such receivers the said Oakes, Payne and Rouse on and prior to the 20th day of September, 1894, and for a long time thereafter, were in possession of and controlled and operated the railroad and property of the defendant, The Northern Pacific Railroad Company, whose transportation line, including its main and leased lines, extended from Chicago, in the State of Illinois, and from Duluth, in the State of Minnesota, to Tacoma, in the State of Washington, and thence to China and Japan over a line of steamers known as the Northern Pacific line, which was operated in connection with said railroad. That for many years the said railroad company prior to the appointment of said receivers and said receivers after their appointment under traffic agreements and other arrangements with connecting railroads and with said line of steamers solicited, obtained and accepted merchandise and other

freights, from Newark, New Jersey, and other eastern points, for transportation over said railroad and said connecting roads and steamers to China and Japan and transported the same accordingly.

Fourth. That on or about the 18th day of September, 1894, your petitioner applied to the said receivers, through their general eastern agent in the city of New York, for a rate upon a pro-
4 posed shipment of pig lead from New York to Yokohama, Japan, and that at the time of such application your petitioner informed the said receivers that it was of vital importance that the said lead should be transported promptly and go forward by the earliest possible steamer without delay, in order to enable the petitioner to fulfill its proposed agreement for the sale thereof in Japan, which required its delivery there by a fixed date; that the said receivers at the city of New York, through said agent, thereupon named a rate for said shipment, and offered to transport the same at the rate mentioned and to forward the same from New York on or before September 29, and by their steamer sailing from Tacoma, Washington, on October 30.

Fifth. That upon receiving the said proposition your petitioner cabled its agents in Yokohama the price at which and the date by which it could deliver said lead there, and thereupon the agents of your petitioner in Yokohama made and entered into a valid and binding contract for the sale of said lead, which provided, however, that the same was to be delivered in Yokohama, by overland route and the most direct connection at San Francisco, Tacoma or Vancouver, and that in case of unusual or extraordinary delay in transit the contract was to be null and void.

Sixth. That in confirmation of the proposition for the transportation of said lead, hereinbefore mentioned, the said receivers of the Northern Pacific Railroad Company, at the city of New York, through their agent, on September 19, 1894, made an offer in writing, a copy of which is hereto annexed marked Exhibit A, to transport the said shipment of pig lead, to consist of not less than 400,000 pounds, from New York to Yokohama at $15 per ton, the same to be forwarded from New York on or before September 29th and from Tacoma by the Northern Pacific steamer sailing from
5 thence on October 30, 1894, in accordance with shipping instructions to be given by said receivers; that on September 20, 1894, your petitioner accepted the said offer in writing, a copy of which is hereto annexed marked Exhibit B, and that thereupon the said receivers of the Northern Pacific Railroad Company agreed and became bound to receive and transport the said lead according to said agreement, by their steamer sailing from Tacoma, Washington, on October 30, 1894.

That on September 22, 1894, the said receivers sent to your petitioner such shipping instructions in writing, a copy of which is hereto annexed marked Exhibit C.

Seventh. That the agent of said receivers expressed some doubt as to whether the said pig lead might not be contraband, in view of the war which was then pending between China and Japan, but said agent, having communicated with the Treasury Department a

Washington, D. C., as your petitioner is informed and believes, ascertained that the lead would be allowed to go forward and would not be stopped as contraband, and thereupon entered into the contract to ship the said lead. That as a matter of fact, the shipment of pig lead was not prohibited by the United States Treasury Department during the war between China and Japan; and at about the same time as the shipment herein mentioned, and on September 25th, 1894, your petitioner made another shipment of pig lead *via* Pacific mail steamers sailing from San Francisco, which was accepted, transported and delivered in Yokohama promptly and without trouble or delay.

Eighth. That on or about September 24th, 1894, the said agent of said receivers informed the petitioner that he declined to ship the said lead, and thereupon on September 24th, 1894, your petitioner sent him a notice in writing, a copy of which is hereto annexed marked Exhibit D, that it relied and insisted upon the fulfillment of the said contract and would hold said receivers liable for any damages resulting from the nonfulfillment thereof.

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Ninth. That thereupon the said receivers accepted the said shipment under said contract and the said lead consisting of 200 tons was, in accordance with the shipping instructions given by said receivers, delivered to the said receivers and loaded into their cars at Newark, New Jersey, on September 27th, 1894, and as your petitioner is informed and believes, was transported to Tacoma, Washington, and delivered there in time for shipment by the Northern Pacific steamer sailing on October 30. That the freight upon said lead from Newark to Yokohama, amounting to $3,360.05 was duly paid to said receivers by your petitioner.

Tenth. That through the negligence, delay, default and failure on the part of the said receivers to fulfill their agreement, the said lead was not shipped from Tacoma on the Northern Pacific steamer sailing October 30, nor until December 11, 1894, when the lead went forward on the Northern Pacific steamer "Victoria," sailing on that day, and did not arrive in Yokohama until on or about January 4, 1895, instead of on or about November 18, 1894, when it was properly due.

Eleventh. That during the said delay there had been a cessation of hostilites between China and Japan, the price of lead had fallen very considerably, and the purchaser of the lead hereinbefore mentioned, refused to accept the same, and declared the contract made with him for the sale of the said lead null and void, in consequence of the failure to promptly deliver the same in accordance with the requirements of said contract.

Twelfth. That the value of the said lead upon its delivery in Japan, on or about the 4th day of January, 1895, was $25,065.60 Mexicans, equivalent to $11,906.16 gold, and that your petitioner subsequently sold the same, realizing therefor the sum of $23,856.00 Mexicans, equivalent to $11,331.60 gold. That the price for which your petitioner had contracted to sell the same was $81,284.58 Mexicans, equivalent to $38,610.17 gold, and that in consequence of the breach of said agreement by said receivers and

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of their negligence, delay, default and failure to fulfill the same, your petitioner has suffered damage in the sum of $56,218.98 Mexicans, equivalent to $26,704.02 gold, with interest thereon from the fourth day of January, 1895, and that the said receivers by reason of the premises became and were indebted to your petitioners in said last-mentioned sum with interest as aforesaid, no part of which has been paid.

Thirteenth. That on the 12th day of May, 1896, a decree was duly entered in the above-entitled cause directing the sale, by Alfred L. Cary, special master, of all the railroad and property controlled and operated by the said receivers under the orders hereinbefore mentioned, and in and by the said decree it was expressly provided that the purchaser at such sale should take the property sold and receive the deed therefor, upon the express condition that such purchaser, his successors or assigns, should pay, satisfy and discharge any indebtedness, obligations or liabilities which should have been contracted or incurred by the receivers before delivery of possession of the property sold; and that if the purchaser of the said property should refuse to pay any such indebtedness, the person holding the claim therefor, upon fifteen days' notice to such purchaser, and his successors or assigns, might file his petition in this court to have such claim enforced against the property sold and the said court reserved jurisdiction of the cause for the purpose of enforcing the said provisions.

8 Fourteenth. That pursuant to the said decree and other similar decrees entered in similar suits in other jurisdictions, the above mentioned railroad property so controlled and operated by said receivers, was sold to the Northern Pacific Railway Company, a corporation duly created and existing under and by virtue of the laws of the State of Wisconsin, on the 25th day of July, 1896. That the said sale was afterward duly confirmed by a decree of this court made July 30, 1896, and similar decrees in such other jurisdictions, and that in pursuance thereof a conveyance of said property was duly made to the said Northern Pacific Railway Company, August 18, 1896, by the said special master, and also by the Northern Pacific Railroad Company, the Farmers' Loan & Trust Company, as trustee of the mortgages foreclosed, and by the receivers. That the said conveyances were made expressly subject to any unpaid indebtedness and obligations or liabilities contracted or incurred by the receivers before delivery of possession of said property sold, and subject also to all the conditions and reservations in the said decrees of foreclosure and in said decrees confirming said sale entered in the above entitled cause, including the reservation to this court, as well as the other courts, of power to re-take and re-sell the premises conveyed, or any part thereof, in case the said purchaser should fail to pay any sum required to be paid by it under said decrees.

Fifteenth. That the claim of your petitioner hereinbefore set forth has been presented to the said receivers and said Northern Pacific Railway Company, who have refused to pay the said claim or any part thereof, and that there now remains due and owing upon said

claim the sum of $26,704.02 with interest thereon from the fourth day of January, 1895.

9 Wherefore, your petitioner prays that its said claim may be enforced against the property of the said Northern Pacific Railway Company, purchased and received by it under the decree in the above entitled action, and other similar decrees, and that your petitioner may have such other or further relief, with its costs, as to the court may seem equitable and proper.

THE AMERICAN TRADING CO.
WM. H. STEVENS, *Treasurer.*

HOWARD VAN SINDEREN,
*Solicitor, 15 Broad St., New York.*

CITY AND COUNTY OF NEW YORK, *ss:*

William H. Stevens, being duly sworn, deposes and says: That he is the treasurer of the petitioner above named; that he has read the said petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

WILLIAM H. STEVENS.

Sworn to before me this 25th day of March, 1897.

PATRICK A. NOLAN,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in N. Y. Co.

10 EXHIBIT A.

Northern Pacific Railroad Company.

Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers.

Geo. R. Fitch, general eastern agent, 319 Broadway.

TRAFFIC DEPARTMENT, NEW YORK CITY, *Sept.* 19, 1894.

American Trading Co., No. 182 Front street, city.

GENTLEMEN: I hereby confirm rate quoted you this day and accepted by you on shipment of pig lead for export to Japan, $15.00 per ton of 2000 lbs. shipment not to consist of less than 400,000 lbs. and to be forwarded from N. Y. on or before Sept. 29th, in accordance with shipping instructions given you by me and to be forwarded from Tacoma, Wash., via Northern Pacific steamer sailing from thence Oct. 30th. Kindly forward your acceptance of the above as early as possible. Thanking you for the favor, I remain,

Yours truly,
(S'g'd) GEO. R. FITCH.

EXHIBIT B.

SEPT. 20TH, 1894.

The Northern Pacific R. R. Co., New York city.

DEAR SIRS: In reply to your esteemed favor Sept. 19th, we beg to accept the rate quoted to us in your letter of Sept. 19th,
11 namely, on 200 tons pig lead, N. Y. to Yokohama, Japan, $15.00 per ton of 2000 lbs., shipment not to consist of less than 400,000 lbs., to be forwarded from N. Y. on or before Sept. 29th, in accordance with shipping instructions to be given by you, and to be forwarded from Tacoma, Washington, via Northern Pacific steamer sailing from that port Oct. 30th. Kindly let us know as soon as possible the shipping instructions, so that we can forward them to our supplier, and oblige, with best respects,

Very truly yours,

THE AMERICAN TRADING CO.

(Signed) FRANK P. BALL.

12 EXHIBIT C.

Northern Pacific Railroad Company.

Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers.

Geo. R. Fitch, general eastern agent, 319 Broadway.

TRAFFIC DEPARTMENT, NEW YORK CITY, *Sept.* 22, 1894.

American Trading Co., 182 Front St., city.

DEAR SIR: I hereby confirm routing given you over the telephone yesterday on your shipment of pig lead for export to Yokohama, Japan, as follows: To be shipped from Newark, N. J., via Penn. R. R., marked Anchor Line rail and lake, care Northern Pacific at Duluth, care A. O. Canfield, agent, N. P. R. R., Tacoma, Wash. Please advise me as soon as possible who the shippers will be, that I may order the cars and also see that same are rushed through without delay to connect with our steamer at Tacoma.

Yours truly,

(Signed) GEO. R. FITCH,
*G. E. Agent.*

A. H. P.

13 EXHIBIT D.

SEPT. 24TH, 1894.

Geo. R. Fitch, Esq., general eastern agent N. P. R. R., No. 319 Broadway, city.

DEAR SIR: Respecting notice just received by us through your Mr. Post, that your company now decline to ship for us via Tacoma the 200 tons of pig lead specified in your contract with us under date Sept. 19th, and confirmed by us under date Sept. 20th, we beg

to advise that we shall hold your company responsible for any loss or damage we may suffer from the non-fulfillment of this contract with you. We remain, dear sirs,

Very truly yours,

THE AMERICAN TRADING CO.

(Signed) WM. H. STEVENS, *Treas.*

STATE OF NEW YORK, }
*So. Dist. of N. Y., City and County of New York,* } ss.:

William H. Bruder, being duly sworn, says, he is of the age of 21 years and upwards and resides at No. 138 West 67th street, in the city of New York; that on the 26th day of March, 1897, between the hours of 12 m. and 1 p. m. at No. 15 Broad street (Mills building) in the city of New York, he served the within petition and notice of motion on the Northern Pacific Railway Company by delivering to and leaving with Charles F. Coaney, Esq., the secretary thereof, a copy of the same; that at the time of such service
14 deponent says he knew the person served as aforesaid to be Charles F. Coaney, Esq., the secretary of said corporation.

WM. H. BRUDER.

Sworn to before me this 27th day of March, 1897.

PATRICK A. NOLAN,

[SEAL.] *Notary Public, Kings County.*

Certificate filed in N. Y. Co.

U. S. circuit court, Filed April 16th, 1897, John A. Shields, clerk.

At a stated term of the circuit court of the United States for the southern district of New York, held in the city of New York on the 16th day of April, 1897.

Present: Hon. E. Henry Lacombe, circuit judge.

THE FARMERS' LOAN AND TRUST COMPANY }
*against*
NORTHERN PACIFIC RAILROAD COMPANY ET AL. }

Upon reading the petition of the American Trading Company, verified March 25, 1897, praying to have its claim for damages therein set forth enforced against the property of the Northern Pacific Railway Company purchased and received by it under
15 the decree in this cause, and the notice of motion dated March 26, 1897, for leave to file the said petition and for the enforcement of said claim, with proof of service of the said petition and such notice upon the Northern Pacific Railway Company, and the said Northern Pacific Railway Company having appeared by Messrs. Sullivan & Cromwell, their solicitors; and after hearing counsel for said petitioner, in favor of said application, and counsel

for said Northern Pacific Railway Company, in opposition thereto, it is hereby

Ordered, that the said petition be filed, and that the Northern Pacific Railway Company file its answer thereto within twenty days from this date; and it is hereby

Further ordered, that the issues be tried before a jury in the common-law branch of this court, and that upon the filing of said answer a further order may then be entered framing such issues for trial accordingly.

E. HENRY LACOMBE,
*U. S. Circuit Judge.*

Approved as to form April 17, 1897.
SULLIVAN & CROMWELL,
*Solicitors for Northern Pacific R'y Co.*

16 Circuit Court of the United States for the Southern District of New York.

THE FARMERS' LOAN AND TRUST COMPANY
*against*
NORTHERN PACIFIC RAILROAD COMPANY ET AL.

The Northern Pacific Railway Company, answering the petition of the American Trading Company herein, upon information and belief, says:

First. It admits the allegations contained in the paragraphs of said petition numbered first, second, thirteenth, fourteenth and fifteenth, except that it denies that any sum is due or owing to the petitioner from the receivers of the Northern Pacific Railroad Company or from this respondent, as in paragraph numbered fifteenth alleged.

Second. It admits that the receivers of the Northern Pacific Railroad Company, as alleged in said petition, were on and prior to the 20th day of September, 1894, and for a considerable time thereafter, in possession of and controlled and operated the railroad and property of the said Northern Pacific Railroad Company; and admits that its transportation line extended from Duluth in the State of Minnesota to Tacoma in the State of Washington; but denies that said receivers ever had any control over any line of steamers from Tacoma to China or Japan; but admits that they received for transportation and transported to Tacoma, merchandise for further transportation upon steamers running from said port to various places; and admits that they accepted merchandise and
17 other freights at Duluth for transportation over said line to Tacoma to be delivered to vessels at that port for further transportation; but denies that they ever entered into any agreements for the transportation of merchandise from Newark, New Jersey, or any other eastern point to the eastern terminus of their said line, and denies that they ever entered into any contract for the transportation of merchandise or other freights beyond the terminus of their said line at Tacoma.

Third. It denies that said receivers ever agreed or offered to transport any merchandise for the petitioner from New York or by any steamer from Tacoma, as in paragraph fourth of said petition alleged; but avers the fact to be that on or about the 18th day of September, 1894, said petitioner applied to one George R. Fitch, who was then acting as agent for said receivers and for certain other persons and corporations at the city of New York, for a rate upon a proposed shipment of pig lead from New York to Yokohama, Japan; and that, if said agent made any agreement for the transportation of said lead to Duluth or from Tacoma to Japan, any such agreement was not made on behalf of said receivers, but was made on behalf of some other person or corporation; and avers that the said agent had no authority to make any agreement on behalf of said receivers for any transportation of said lead except over the railways then in the possession of said receivers, and that said receivers never had any authority to make and never did make any contract for the transportation of said lead except over the lines of railroad in their possession.

Fourth. This respondent has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph of said petition numbered fifth, and therefore leaves said petitioner to such proof thereof as it may be advised.

18 Fifth. It denies that said receivers on September 19, 1894, or at any other time, through their agent or otherwise, made any offer in writing to transport any shipment of pig lead from New York to Yokohama; but avers that if any such offer was made by any person acting as the agent of said receivers, the same was not made for said receivers except in so far as transportation over the lines of railroad in the control of said receivers was concerned, and that the said agent, if he made any offer for the transportation of said lead over any other lines or by any other means, was acting as the agent of other persons or corporations and not for the said receivers; of all of which petitioner had due notice.

Sixth. This respondent denies that in any transactions respecting the shipment of said lead alleged in paragraphs of said petition numbered seventh, eighth, and ninth, said receivers through their agent or otherwise, had any concern or did anything whatsoever except in respect of the transportation thereof over the lines of railroad in their possession, and except that this respondent admits that said lead was received by the said receivers upon their said line at Duluth aforesaid, and was transported to Tacoma, Washington, and delivered there in time for shipment by the steamer sailing on October 30th, 1894, and avers that the person designated in said paragraph of said petition as the agent of said receivers, was George R. Fitch, aforesaid, who was agent for other persons and corporations, and that with regard to all of said matters concerning the transportation of said lead over other parts of the route than the lines of railroad in possession of said receivers he acted as agent for such other persons and corporations and not for said receivers; of all of which said petitioner had due notice.

Seventh. This respondent denies that through the negli-
19 gence, default or failure in any way on the part of said receivers to fulfill their agreement, said lead was not shipped from Tacoma on October 30, 1894, as alleged in the paragraph of said petition numbered tenth; and avers that said receivers duly received said lead at Duluth and transported the same to Tacoma without delay and in time for shipment there by the steamer sailing October 30, 1894, and that if any delay occurred in the shipment of said lead such delay was due to the conduct of other persons or corporations and not to the conduct of said receivers.

Eighth. This respondent has no knowledge or information sufficient to form a belief as to the truth of the allegations in said petition in paragraphs numbered eleventh and twelfth contained, and therefore leaves said petitioner to make such proof thereof as it may be advised.

Ninth. This respondent further alleges that at the time in the petition mentioned, said receivers had various traffic contracts with various corporations engaged in the business of transportation of goods from and to points in the line of the railroad then in the possession of said receivers and operated by them, under which goods were received by said receivers from carriers at points in their line and transported to other points in their line, and goods transported over the lines operated by said receivers, were delivered to the various carriers with whom said receivers had such contracts, and transported by them to points beyond the lines of railroad operated by said receivers; that for convenience the same persons in different places acted as agents both of said receivers and of such other carriers in the transportation of goods from and to points not reached by the lines operated by said receivers, but passing over their lines or some portion thereof; that among such carriers were the Anchor line, so called, engaged in the transportation of goods from New
20 York and other eastern points to points on the Lakes, and the Northern Pacific Steamship Company, a corporation engaged in the transportation of goods from Tacoma, Washington, to Japan and other oriental points; that one George R. Fitch was at the time aforesaid, agent at New York for said receivers and for said Anchor line and said Northern Pacific Steamship Company, and was accustomed to make contracts for the transportation of goods from New York and other eastern points to points reached by the steamers of said steamship company passing over the lines operated by said receivers, and that in making such contracts he acted for said Anchor line in contracting for the transportation of goods from eastern points to Duluth, for said receivers in contracting for the transportation of goods from Duluth to Tacoma, and for said Northern Pacific Steamship Company in contracting for the transportation of goods beyond Tacoma, but in no case did he act for any of the said carriers in contracting for the transportation of goods except upon the lines controlled or operated by them; that said receivers never exercised any control whatsoever, or had any interest in the transportation of goods by the vessels of said steamship company and never did nor were authorized to assume any responsibility therefor, and

that the said agent never did nor undertook to contract for said receivers in respect of any transportation except over the lines of railway controlled by them; that the petitioner applied to said Fitch in regard to the transportation of said lead and well knew that said Fitch could not make and did not make on behalf of said receivers any contract for the transportation of the same except over their lines, nor did nor could make any offer on behalf of said receivers to transport the same except over the lines controlled by them; that said lead was duly, punctually and safely transported by said receivers over their lines and delivered at Tacoma to the said steamship company, and that if any delay occurred in the trans-
21 portation thereof, the same occurred after the delivery to said steamship company, and said receivers are not and never were responsible therefor.

Tenth. That by the custom of carriers, when goods are furnished for transportation, the terms and conditions upon which such goods shall be transported are expressed by a bill of lading issued after such goods have been so received, and such transportation is subject to the terms and conditions in such bill of lading expressed; that a bill of lading containing such terms and conditions as hereinafter set forth was furnished to petitioner for the transportation of said lead, and the conditions of the liability of the carriers thereunder as expressed therein, were and are binding upon the petitioner, as well as upon the carriers; that petitioner duly accepted said bill of lading and made use thereof and did not protest against the same nor object to any other provisions contained therein, and that none of the carriers of said lead are responsible otherwise than as in said bill of lading expressed.

Eleventh. This respondent further alleges that the contract for the transportation of said lead was contained in a bill of lading expressing the terms upon which the same was to be and was transported, which bill of lading was delivered to the said petitioner and accepted by it as expressing the terms and conditions of the transportation of said lead; that in and by said bill of lading it was expressly stated that said agent signed for the carriers therein named severally and not jointly; and it was further provided that no carrier should be liable for loss or damage not occurring on its own road or its portion of the through route, nor after such property should be ready for delivery to the next carrier; and this respondent avers that if any loss, damage or delay occurred to petitioner in the transportation of said lead, the same occurred after
22 said lead had been delivered by said receivers to said Northern Pacific Steamship Company, which was the next carrier, and not upon the receivers' portion of the through route.

Twelfth. That it was in and by said bill of lading further provided with respect to the service after delivery at the port of Tacoma, that the carrier should not be liable for loss or damage occasioned by arrest and restraint of princes, rulers or people; that the said lead was duly delivered on October 30, 1894, at Tacoma aforesaid to said Northern Pacific Steamship Company and was by it duly loaded aboard its steamer sailing that day; but that the Government of the

United States refused to allow said steamer to sail carrying said lead and compelled said steamship company to unload the same in order to obtain clearance for said vessel; that in accordance with said direction of said Government said lead was unloaded, and that all delay in the transportation of the same arose from that cause and not otherwise; and that under the bill of lading the carrier was not and is not responsible therefor.

Thirteenth. That in and by said bill of lading it was further provided that said lead was accepted for transportation subject to delay, and that any loss to the petitioner which occurred in the course of such transportation was due solely to delay in the transportation thereof from Tacoma, Washington, to Japan; and that no carrier of said lead is responsible for any damages arising from such cause.

Wherefore this respondent prays that the said petition be dismissed with costs.

NORTHERN PACIFIC RAILWAY CO.,
By WM. NELSON CROMWELL,
*Associate Counsel.*

SULLIVAN & CROMWELL, *Solicitors.*

23 SOUTHERN DISTRICT OF NEW YORK, } *ss:*
*City and County of New York,* }

Charles F. Coaney being duly sworn, deposes and says: That he is the secretary of the respondent above named; that he has read the said answer and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

CHARLES F. COANEY.

Sworn to before me this 17th day of May, 1897.
JOHN J. NERNEY,
*Notary Public, Kings Co.*

Cert. filed in New York Co., N. Y.

Endorsed: U. S. circuit court. Filed May 17, 1897. John A. Shields, clerk.

24 Circuit Court of the United States, Southern District of New York.

THE FARMERS' LOAN AND TRUST COMPANY }
*against*
THE NORTHERN PACIFIC RAILROAD COMPANY. }

In the Matter of the Intervention of THE AMERICAN TRADING COMPANY.

By an order made at a stated term of the circuit court of the United States, for the southern district of New York, held in the city of New York, on the 16th day of April, 1897, and duly entered

and filed, the American Trading Company was allowed to file its petition herein verified March 25, 1897, praying to have its claim for damages therein set forth enforced against the property of the Northern Pacific Railway Company purchased and received by it under the decree in this cause; and the Northern Pacific Railway Company was directed to file its answer to the petition; and it was thereby further ordered that the issues be tried before a jury, in the common law branch of the court, and that upon the filing of the said answer a further order might be entered framing such issues for trial accordingly.

The petition and answer were duly filed accordingly and
25 now remain on file, but no order framing the issues for trial has ever been made; and, in lieu thereof, the following is a statement of facts agreed upon by the Northern Pacific Railway Company and by the American Trading Company, upon which the case is submitted to the decision of the court, and trial by jury is hereby waived:

1. In September, 1894, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse were receivers of the Northern Pacific Railroad Company, under an order made in a suit bearing the same title as the present suit, in the United States circuit court, for the eastern district of Wisconsin, to which this suit is ancillary. Under that order, the receivers were authorized to continue, and were continuing to carry on the business of the railroad in their charge.

2. The line of railroad in the possession of the receivers extended from Duluth, Minnesota, to Tacoma, Washington. The receivers had contracts with various carriers reaching points on their line, by which through bills of lading were issued from and to points not upon the line of the receivers' railroad, where the freight passed over some part of that line in transit. Among the carriers with whom the receivers had such arrangements was the Northern Pacific Steamship Company. This was an English company, operating a line of steamers between Tacoma and points in Japan and China, including Yokohama. The contract between the steamship company and the receivers was the contract originally made on March 30, 1892, between the Northern Pacific Railroad Company and the Northern Pacific Steamship Company, and ratified and adopted by the receivers under the authority of an order of the circuit court of the United States made on September 13th, 1893. A copy of the contract is hereto annexed marked Exhibit A.

26 The receivers held no stock in the steamship company and had no other express contract relation with the steamship company. This stipulation is not to be accepted as an admission by the railroad company or the receivers or their counsel, that there were any relations between the receivers and the steamship company other than those growing out of the facts herein agreed upon.

3. For convenience in transacting their freight business in the eastern part of the United States, the receivers maintained an office in the city of New York, which was, in September, 1894, in charge of one George R. Fitch, who was their general eastern agent, and made arrangements for the transportation of freight over the receiv-

ers' line of railway and connections, including transportation to China and Japan.

At the time of the transactions referred to in this statement of facts, the said Fitch had not received, nor did he ever receive any direct or independent appointment or authority from the Northern Pacific Steamship Company to act as agent of that company. His only authority as agent of the steamship company was that created by, or arising from, the contract, Exhibit A. Fitch knew that an arrangement had been concluded by the receivers and the steamship company by which contracts for through shipment to Yokohama might be made by the agents of the receivers, and through bills of lading issued, and he had been instructed by the receivers to solicit freight for through transportation upon bills of lading of which Exhibit C, hereto annexed, is a copy; but Fitch did not know the terms of the contract between the steamship company and the receivers, and the trading company did not know what company operated the steamships between Tacoma and Yokohama, or that the steamship company was a separate and independent company, or that there was any contract between the receivers and the steamship company.

27 It is further stipulated that Fitch had no express general authority to make contracts for through transportation except as provided by the said bills of lading; and no express authority to make the contract in question, unless such express authority be found in the telegrams, of which copies are hereinafter set forth; that the American Trading Company did not know the terms of his express authority; and that this stipulation is not to be taken as an admission by the railroad company or the receivers or their counsel, that his implied authority was greater than his express authority.

4. The American Trading Company is, and was in September, 1894, a corporation organized under the laws of the State of Connecticut, having its principal office in the city of New York, and carried on a general commercial business with Asiatic ports.

5. In September, 1894, the trading company applied to Fitch for a rate upon a proposed shipment of pig lead from New York to Yokohama, Japan, and informed him that it was of vital importance that the lead should be transported promptly and go forward by the earliest possible steamer without delay, in order to enable the trading company to fulfill a proposed agreement which it was about to make for the sale of the lead in Japan, and which would require its delivery there at a fixed date. Fitch thereupon named a rate, and undertook to forward the lead from New York on or before September 29th, and *via* the Northern Pacific steamer "Tacoma" sailing from Tacoma October 30, 1894.

6. Thereupon the trading company cabled to its agents at Yokohama naming a price and a date at which the lead could be delivered there; and thereupon its agents in Yokohama made

28 a contract for the sale of the lead, which contract provided that it should be delivered in Yokohama by overland route, and the most direct connection at San Francisco, Tacoma or Van-

couver, and that in case of unusual or extraordinary delay in transit the contract should be null and void. Neither Fitch nor the receivers knew until September 24th, that any contract for the sale of lead in Japan had been concluded by the trading company, and, except as hereinbefore and hereinafter stated, they never received any information in regard to its terms, as made or proposed. Upon the conclusion of its Japanese contract the trading company purchased two hundred tons of pig lead in bond from the Balbeck Smelting and Refining Company.

7. On September 19, 1894, Fitch, in confirmation of his previous statement, wrote and sent to the trading company the following letter:

29 Northern Pacific Railroad Company.

Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers.

Geo. R. Fitch, general eastern agent, 319 Broadway.

TRAFFIC DEPARTMENT, NEW YORK CITY, *Sept.* 19, 1894.

American Trading Co., 182 Front St., city.

GENTLEMEN: I hereby confirm rate quoted you this day and accepted by you on shipment of pig lead for export to Japan, as follows:

Pig lead New York to Yokohama, Japan, $15.00 per ton of 2000 lbs., shipment not to consist of less than 400,000 lbs., and to be forwarded from New York on or before Sept. 29th, in accordance with shipping instructions given you by me and to be forwarded from Tacoma, Wash. *via* Northern Pacific steamer sailing from thence October 30th. Kindly forward your acceptance of the above as early as possible. Thanking you for the favor, I remain,

Yours truly, GEO. R. FITCH,
*G. E. Agent.*

The trading company wrote and sent in reply (accepting the proposition) the following letter:

SEPT. 20TH, 1894.

The Northern Pacific R. R. Co., New York city.

DEAR SIRS: In reply to your esteemed favor Sept. 19th, we beg to accept the rate quoted to us in your letter of Sept. 19th, namely, on 200 tons pig lead, N. Y. to Yokohama, Japan, $15.00 per ton of 2000 lbs., shipment not to consist of less than 400,000 lbs., to be forwarded from N. Y. on or before Sept. 29th, in accordance with ship-
30 ping instructions to be given by you, and to be forwarded from Tacoma, Washington *via* Northern Pacific steamer sailing from that port Oct. 30th. Kindly let us know as soon as possible the shipping instructions, so that we can forward them to our supplier, and oblige, with best respects,

Very truly yours,
THE AMERICAN TRADING CO.
(Signed) FRANK P. BALL.

On September 22, 1894, Fitch wrote and sent to the trading company the following letter, giving shipping instructions:

31 Northern Pacific Railroad Company.

Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers.

Geo. R. Fitch, general eastern agent, 319 Broadway.

TRAFFIC DEPARTMENT, NEW YORK CITY, *Sept.* 22, 1894.

American Trading Co., No. 182 Front St., city.

DEAR SIR: I hereby confirm routing given you over the telephone yesterday on your shipment of pig lead for export to Yokohama, Japan, as follows:—To be shipped from Newark, N. J. via Penn. R. R. marked Anchor Line rail and lake care Northern Pacific at Duluth care A. O. Canfield, agent N. P. R. R., Tacoma, Wash. Please advise me as soon as possible who the shippers will be that I may order the cars and also see that same are rushed through without delay to connect with our steamer at Tacoma.

Yours truly, GEO. R. FITCH,
*G. E. Agent.*

A. H. P.

8. Before naming a rate for the transportation of the lead, Fitch had expressed some doubt as to whether it might not be excluded from transportation as contraband in view of the war then existing between China and Japan. In fact, the shipment of pig lead was not prohibited by the Treasury Department at Washington, during the war between China and Japan, and on September 25th, 1894, the trading company made another shipment of pig lead via Pacific Mail steamer sailing from San Francisco, which was, without trouble or delay, transported and delivered in Yokohama.

9. In September, 1894 J. B. Baird was the second assistant
32 general freight agent of the receivers, and J. M. Hannaford was the general freight agent of the receivers; and telegrams of which the following are copies, relating to proposed shipments of pig lead, including the shipment in question, passed between the said Fitch and Baird and Hannaford, but were not disclosed to the American Trading Company:

NEW YORK, *September* 14, 1894.

J. B. Baird, second A. G. F. A.:

Please wire quick lowest rate one hundred ton lots pig lead from Chicago and Duluth to Yokohama.

GEO. R. FITCH.

SEPTEMBER 14, 1894.

Geo. R. Fitch, 319 Broadway, New York, N. Y.:

You may quote as low as sixty cents from Duluth and seventy cents from Chicago to Yokohama on pig lead in one hundred ton lots. Get more if possible.

J. B. BAIRD.

SEPTEMBER 17, 1894.

New York, September 17, 1894.

J. B. Baird, 2d A. G. F. A.:

Your wire fourteenth. Shall I accept fifty cents on pig lead Duluth to Yokohama. Also name lowest rate on two hundred tons St. Louis to Yokohama.

GEO. R. FITCH.

SEPTEMBER 18TH, 1894.

Geo. R. Fitch, 319 Broadway, New York:

Cannot accept less than sixty cents on pig lead Duluth to Yokohama. Will quote from St. Louis later.

0.900. J. B. BAIRD. WDB.

33 SEPT. 19TH, 1894.

G. R. Fitch, 319 Broadway, New York:

You may quote seventy cents on the pig lead in one hundred ton lots St. Louis to Yokohama. Advise if accepted.

0.900. J. B. BAIRD. WDB.

NEW YORK, *September* 21, 1894.

J. B. Baird, N. P. R'y, St. Paul, Minn.:

Wire best rate two hundred fifty tons pig lead Duluth to Shanghai.

GEO. R. FITCH.

SEPTEMBER 22, 1894.

G. R. Fitch, 319 Broadway, New York:

N. P. Steamship Co. have now declined to handle lead for Yokohama, Kobe, Hong Kong or Shanghai. Please cancel your quotation.

0.900. J. B. BAIRD. WDB.

On September 24, 1894, Fitch informed the trading company that he declined to ship the lead upon the ground that it might be contraband of war, and thereupon on the same day the trading company wrote him a letter stating that they would hold his company responsible for any loss from failure to fulfill the contract, which letter is as follows:

SEPT. 24TH, 1894.

Geo. R. Fitch, Esq., general eastern agent N. P. R. R., No. 319 Broadway, city.

DEAR SIR: Respecting your notice just received by us through your Mr. Post, that your company now decline to ship for us via Tacoma the 200 tons of pig lead specified in your contract with us under date Sept. 19th, and confirmed by us under date Sept.

20th, we beg to advise that we shall hold your company
34 responsible for any loss or damage we may suffer from the non-fulfilment of this contract with you.

We remain, dear sirs,

Very truly yours,

THE AMERICAN TRADING CO.

(Signed) WM. H. STEVENS, *Treas.*

Thereupon, telegrams of which the following are copies were sent and received as indicated, in relation to the shipment in question but were not disclosed to the trading company.

NEW YORK, *Sept.* 24, 1894.

J. B. Baird, N. P. R'y, St. Paul, Minn.:

Shipment lead to Yokohama is now being made shippers refuse to accept withdrawal, we have given shippers written contract.

GEO. R. FITCH.

NEW YORK, *Sept.* 24, 1894.

J. M. Hannaford, N. P. R'y, St. Paul, Minn.:

Have notified American Trading Co., that shipment will be refused. They state they will hold us to contract. They are shipping hundred tons from Denver to Yokohama by steamer City of Rio from San Francisco, Oct. fourth and expect to forward this shipment same way, will charge us difference in rate. Advise quick.

GEO. R. FITCH.

SEPT. 25, 1894.

G. R. Fitch, 319 Broadway, New York:

Your wire this date to Mr. Hannaford: Dodwell, Carlill & Co. have consented to accept the lead already contracted. Do not contract for any more. Advise quick number of pounds contracted by you and say how it will be routed. Think we should receipt for lead subject to delay.

0/900. J. B. BAIRD. WDB.

35 Dodwell, Carlill & Co., mentioned in the last telegram represented the steamship company.

10. Thereupon the refusal to accept the shipment was withdrawn, and the shipment was made under the contract, and the lead, consisting of two hundred tons, was, in accordance with the shipping instructions given in Fitch's letter of September 22, 1894, shipped at Newark, New Jersey, on September 27th, 1894, by the Balbeck Smelting and Refining Company for account of the American Trading Company. This was the first shipment ever made by the American Trading Company over the line of the Northern Pacific Railroad Company and its connecting carriers. The shipment was made in bond for exportation at Tacoma, and was secured upon the cars by Government locks and customs seals. On the afternoon of September 27, 1894, the shipment left Newark, and started on its journey,

and was transported via the Anchor line, a carrier operating between eastern points and points on the Lakes, to Duluth, and carried from Duluth via the receivers' railroad to Tacoma, which it reached in time for shipment by the steamship company's steamer "Tacoma," sailing October 30, 1894. On September 28th, a cheque for the freight upon the lead from Newark to Yokohama was handed by the trading company to Fitch, of which cheque, with its indorsements the following is a copy:

The American Trading Co.

*Cheque.*

NEW YORK, *Sept.* 28" 1894. No. 6096.

The National Bank of North America

Pay to the order of the Northern Pacific R. R. $3360.05. Thirty three hundred sixty & 05/100 dollars.

THE AMERICAN TRADING CO.
WM. H. STEVENS, *Treas'r.*

A. PROCTOR, JR.,
*Cashier.*

36

Endorsements.

For deposit in
Ninth National Bank
to Cr. of Geo. R. Fitch,
Gen. east'n ag't.
Ninth Nat'l Bank,
Endorsement
guaranteed
of the City of N. Y.

The amount of the cheque was credited at the Ninth national bank to the account of "George R. Fitch, general eastern agent," which was the style of the account opened by Fitch as agent of the Northern Pacific railroad; and the account was never drawn upon in favor of the Northern Steamship Company, but all through freights received were deposited to the credit of this account and remitted to the railroad company, or its receivers, and were divided and distributed by them under their contract with the steamship company.

II. On September 28, 1894, a shipping receipt for the shipment was issued to the Balbeck Smelting and Refining Company, of which shipping receipt a copy is hereto annexed marked Exhibit "B," and was delivered by the Balbeck Smelting and Refining Company to the American Trading Company, and was forthwith surrendered by the trading company to Fitch.

A bill of lading in the usual printed form, a copy of which is hereto annexed marked "C," was subsequently issued by Fitch to the American Trading Company. It was received by a clerk of the

trading company without stated objection to its terms, but was not read or examined by him or by any officer of the company, and was immediately hypothecated with the Hong Kong and Shang-
37 hai bank, as collateral security for moneys borrowed thereon by the trading company. The original of the bill of lading was negotiable, and did not have stamped upon it the words "not negotiable, shipper's copy," which appear on the shipper's copy hereto annexed, but was similar to the shipper's copy in all other respects.

On September 29th, 1894, Fitch sent a copy of this bill of lading to Dodwell, Carlill & Co., with a letter (not disclosed to the American Trading Company) of which the following is a copy:

38 Northern Pacific Railroad Company.

Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers.

Geo. R. Fitch, general eastern agent, 319 Broadway.

TRAFFIC DEPARTMENT, NEW YORK CITY, *Sept.* 29, 1894.

Dodwell, Carlill & Co., Tacoma, Wash.

GENTLEMEN: I hand you herewith my B/L 1507 covering shipment of pig lead for export to Amer. Trading Co. Yokohama, Japan. As I have previously advised you, I have made contract guaranteeing delivery of this shipment at Yokohama by our S. S. Tacoma sailing Oct. 30th. Will you kindly see that this connection is made, without fail.

Yours truly,

(S'g'd) GEO. R. FITCH, *G. E. A.*

The previous letter of advice referred to by Fitch in the foregoing letter is lost and no copy of it exists. It appears, however, from the following letter of acknowledgment to have borne date on September 27th.

TACOMA, WN., *October 2nd*, 1894.

George R. Fitch, Esq., G. E. A., N. P. R. R., 319 Broadway, New York.

DEAR SIR: We beg to own receipt of and thank you for your favor of the 27th ultimo, advising the engagement of 40 tons condensed milk and 225 tons pig lead for our steamer "Tacoma," sailing hence the 30th instant. Please keep us frequently advised of freight engagements, as we have applications now for more
39 space for flour than our steamers will carry, and we are shutting out considerable of the latter every voyage.

Yours truly,

(Sig.) *p. p.* DODWELL, CARLILL & CO.
A. T. PRICHARD.

12. At Tacoma the lead was delivered by the receivers to the Northern Pacific Steamship Company and was loaded upon the "Tacoma," the vessel of the steamship company, which was to sail on October 30th; but about four o'clock in the afternoon of that day, the deputy collector of the United States at that port refused to clear the vessel while the lead was on board upon the ground that it was contraband of war, and telegraphed to the collector of Port Townsend for instructions. On the following day, which was the 31st of October, the deputy collector at Tacoma received a telegram from the collector of the United States at Port Townsend, which was as follows:

"Department advises that unless you have evidence tending to show that the pig lead now at Tacoma and referred to in your telegram of yesterday is to be used in the war between China and Japan, no reason is perceived why shipment should not be permitted."

In the meantime, however, the master of the vessel unloaded the lead, which delayed the ship until 9 a. m. on the morning of October 31st, when he sailed without it.

The petitioner was not notified of the delay in the transhipment of the lead until November 5th, 1894.

The next vessel on the line was the "Sikh," which did not belong to the steamship company, but was a chartered ship. Her captain declined to take the lead on the ground that it was contraband. The Northern Pacific Steamship Company cabled to the owners of the vessel at London, and they adhered to the position taken by the captain.

40 13. The lead went forward on the next vessel, the "Victoria," on December 11, 1894, and did not arrive in Yokohama until on or about January 4, 1895, instead of on or about November 18, 1894, when it would have arrived had it gone forward on the 30th of October, 1894.

14. In the meantime hostilities between China and Japan had ceased, the price of lead had fallen very considerably, and the purchaser of the shipment refused to accept it and declared the contract null and void in consequence of the failure to deliver it promptly in accordance with the terms of the contract.

15. The price of the lead under the contract would have been $38,610.17. The lead was delivered to the trading company in Yokohama upon the surrender of the bill of lading, and in consequence of the failure of its vendee to accept the lead, the trading company sold it for $11,331.60, which was the best price obtainable therefor, at the time of sale. The sale was made as soon as a purchaser could be found. The value of the lead on January 4, 1895, in Japan, was $11,906.16.

16. Upon the case arising on the foregoing facts, the American Trading Company has duly presented to the receivers and to the Northern Pacific Railway Company, its claim amounting to the sum of $26,704.02, with interest thereon from the 4th day of January, 1895, and has demanded payment thereof, but payment has been refused, and no part thereof has been paid.

All of which is respectfully submitted.
Dated New York, March 11, 1901.

HOWARD VAN SINDEREN,
*Attorney for the American Trading Company, the Intervening Petitioner.*

WILLIAM NELSON CROMWELL,
*Attorney for the Northern Pacific Railway Company.*

41 EXHIBIT A.

Memorandum of agreement, made and entered into at Chicago, Illinois, United States of America, this thirtieth (30th) day of March, 1892, between the Northern Pacific Railroad Company, first party, and the Northern Pacific Steamship Company, of Govan, Glasgow, Scotland, second party.

That whereas, the second party desires to establish a line of steamships between Hong Kong and the ports of China and Japan and the city of Tacoma, Washington, United States of America, said steamships to be suitable for the intended trade between the ports of China and Japan, and other Asiatic ports, and points in the United States of America and Canada and Europe, and

Whereas, the first party is engaged in operating a railroad in the northern portion of the United States of America, and is desirous of forming an alliance for the purpose of controlling passenger and freight traffic and other business between the above mentioned points,

Now therefore, it is hereby mutually covenanted and agreed between the parties hereto as follows:

1. Establishment of steamship line.

(*a.*) The second party shall procure, establish and commence to run a monthly line of steamships between Hong Kong and the ports of China and Japan and the port of Tacoma, Wash., within six months from date hereof. Said steamships shall be capable of carrying three thousand (3,000) tons of measurement cargo (inclusive of accommodation for steerage passengers) and shall have a speed of between ten (10) and eleven (11) knots per hour, with fair saloon passenger accommodations, and be suitable for handling tea, rice and general merchandise or other cargo or passengers that may be offered for transportation between the Asiatic ports referred to and points in the United States of America, Canada and Europe.

42 (*b.*) The second party shall have the right, should there be insufficient traffic offering during the slack season (January to April inclusive), to run one steamship every two months in place of monthly.

(*c.*) If the traffic offered shall increase so that it is practicable to run more steamers than provided for by this agreement, either by shortening schedule time or running extra steamers, the second party shall supply them.

(*d.*) The second party shall have the right, should it be deemed advisable, or become expedient in order to meet competition, to call at Honolulu and or Victoria, B. C., on the voyage to and from Tacoma, Washington, and also to send its steamships on to San Francisco after leaving Tacoma on the inward voyage, returning to Tacoma before leaving upon the outward trip.

2. Division of through rates on overland cargo.

(*a.*) The through rate by steamship and rail shall be divided equally between the parties hereto, provided that:

(*b.*) The first party shall receive a minimum of seventy-five (75) cents per hundred (100) pounds to and from points east of Chicago which are ordinarily termed eastern common points, and which include in the main: New York, Troy, Albany, Schenectady, Buffalo (New York), Boston, Fitchburg, Gloucester, Lawrence, Salem, Springfield, Worcester (Mass.), Hartford, New Haven (Conn.), Baltimore (Md.), Philadelphia, Harrisburg, Pittsburg (Pa.), Cleveland, Cincinnati, Toledo (Ohio), Indianapolis (Ind.), Detroit, Port Huron (Mich.), Paterson (N. J.), Concord, Manchester, Nashua (N. H.), Providence (R. I.), New Orleans (La.), Memphis (Tenn.), Toronto, Brockville, Kingston, Ottawa, Cornwall, Hamilton, London, Prescott (Ontario), Montreal, Quebec (Que.).

43 (*c.*) The first party shall receive a minimum of fifty (50) cents per (100) hundred pounds to and from points ordinarily termed western common points, and which include in the main: Chicago (Ill.), Minneapolis, St. Paul, Duluth (Minn.), Omaha (Neb.), Council Bluffs, Sioux City, Dubuque, Keokuk (Iowa), Leavenworth, Atchison (Kansas), Kansas City, St. Joseph, St. Louis (Mo.), Milwaukee (Wis.), Winnepeg (Man.).

(*d.*) Any reduction in the through rate from the above basis shall be borne by the second party until the minimum accruing to the steamships shall reach 35 cents (thirty-five) per hundred (100) pounds. Should it become necessary or advisable to accept through rates lower than on above basis, such lower basis shall be first agreed upon between the two parties hereto, and after deducting from the agreed through rate such a*b*ritraries as are demanded by the connections of the first party, the balance of the through rate shall be prorated in the proportion of: To the first party fifty (50) cents, and to the second party thirty-five (35) cents.

(*e.*) Should it become necessary in order to meet the competition of the Canadian Pacific Railway and Steamship Line or other competing lines in the transportation of raw cotton or cotton piece goods (domestics) destined to Asiatic ports, the first party is hereby authorized to reduce the minimum accruing to the second party to a basis of twenty-five (25) cents per hundred pounds to meet such competition.

(*f.*) On raw silk and silk piece goods and other valuable cargo requiring equal to passenger train service, there shall first be deducted from the through rate one dollar ($1.00) per hundred pounds to be allowed the first party for such expedited service, and the remainder of through rate to be divided as provided in article 2d, and paragraphs A and B.

44 3. Division of through rates on overland passenger traffic.

The through rate by steamship and rail shall be divided as follows :

After deducting the arbitraries to be paid out to connecting lines, the balance shall be divided and the first party shall receive eighteen (18) per cent., and the second party eighty-two (82) per cent., with minimum of thirty-five (35) dollars gold, to the first party.

4. Traffic (cargo and passenger) between Asiatic and Pacific Coast ports.

(*a.*) All traffic between the Pacific Coast and Asiatic ports shall be for the sole benefit of the second party.

(*b.*) The second party wherever possible shall forward such cargo by the railroads of the first party, or by the railroads or steamship lines controlled by the first party, at rates to be agreed upon, which shall not exceed twenty-five (25) per cent. of the through rate per steamship freight list and with a minimum to the first party or its connections of one dollar ($1.00) gold per ton steamships freight list.

(*c.*) The first party shall assist the second party in obtaining low rates between Tacoma and other Pacific Coast points on cargo handled at Tacoma to or from connecting lines.

(*d.*) On cargo from which the first party receives no benefit, the second party will pay to the first party the actual cost of labor service at Tacoma, which shall not exceed twenty-five cents (25) cents per ton.

(*e.*) On passenger traffic to or from Pacific Coast points other than Tacoma, and interior points not on or reached by the railroad of the first party, the second party shall pay all cost of connections to or from Tacoma.

45 5. Asiatic cargo to western local points.

(*a.*) For cargo in not less than car-load lots of (24,000) pounds gross weight or tons, 25 measurement of forty (40 cubic feet) from Asiatic ports to points on the line of the first party between Tacoma and St. Paul, the second party may issue through bills of lading at the current rate of freight on similar goods to parallel points on competing lines.

(*b.*) For cargo in less than car-load lots to the local points above mentioned the second party shall not issue bills of lading beyond Tacoma, and the first party shall have the right to charge thereon its local rate from Tacoma to destination.

6. Agencies.

(*a.*) The second party shall have the exclusive right to appoint agents in Asiatic ports, who shall be duly authorized to act as agents for both parties hereto and who shall have power to issue bills of lading and passenger tickets and to make and name rates on all traffic to points in the United States, Canada and Europe, subject to clauses two and five (2 and 5).

(*b.*) The second party shall have the right, should it be deemed advisable or necessary to appoint, at its own expense, agents in Tacoma, Wash., and or Portland, Ore., and or Victoria, B. C., for the management of the steamships at the ports of call and to procure

traffic from the Pacific coast and for the purpose of assisting and advising the first party in all matters pertaining to the steamship service.

(*c.*) The second party shall have the right, should it be deemed advisable or necessary, to appoint an agent, at its own expense, in New York, United States of America, whose duty shall be to assist in procuring traffic for the steamships of the second party and who shall be under the control of the first party as regards rates.

(*d.*) The first party shall have the exclusive right, with the exceptions above (paragraphs "B" and "C") to appoint agents in all
46 points in the United States, Canada and Europe, and the second party hereby authorizes the first party and its appointed agents to act as agents for the second party and to issue bills of lading and passenger tickets and to make and name rates on all traffic for the Asiatic points served by the steamships of the second party, subject to clause two (2).

7. Commission to agents as remuneration for procuring traffic.

The first party shall pay the agents of the second party a commission of (5) per cent. on its earnings on all Asiatic traffic procured by them; and the second party shall pay the first party for its agents a commission of five (5) per cent. on its earnings on all traffic for Asiatic ports obtained by the agents of the first party.

8. Tallying of cargo.

(*a.*) On arrival of the steamships at Tacoma the cargo shall be carefully tallied out by the officers of the steamships in conjunction with the officials of the first party, all damaged packages shall be set aside and a full and correct list thereof made, and for claims on such damaged packages the second party shall and hereby agrees to be responsible.

The first party shall give the steamship a receipt for all cargoes received at Tacoma, and as regards cargo to be carried over the lines of the first party, the responsibility of the second party shall cease on correct delivery at Tacoma.

(*b.*) On cargo destined for Asiatic ports and delivered to the steamships at Tacoma, a careful tally shall be kept by the officers of the steamship in conjunction with the officials of the first party. All damaged packages shall be set aside and a full and correct list thereof made, and for claims on such damaged packages the first party shall and hereby agrees to be responsible. The steamship officers shall give a receipt for all cargo taken on
47 board at Tacoma, which shall absolve the first party from all further responsibility.

9. Quick dispatch of vessels, coals, etc.—Return cargoes.

The first party agrees to do all it can to assist the second party in obtaining quick dispatch in discharging and loading its steamships at Tacoma; to assist in making contracts for coal, provisions, and labor required by its vessels. And to authorize and permit the agents everywhere (saving as specified in clause 6, paragraphs "B" and "C") to actively solicit all and any traffic that may be required for the return voyages of the steamships to Japan and China.

10. Wharfage.

(a.) First party agrees to provide wharfage at Tacoma free of expense to the second party on all traffic passing over the railroads of the first party.

(b.) On cargo to or from Tacoma locally and Asiatic points, the first party may make a charge to the shippers or consignees of twenty-five (25) cents per ton per steamship's freight list.

11. Cost of advertising, telegraphing, stationery.

The cost of stationery (printing forms, etc.) and of advertising and telegraphing in and from China and Japan shall be at the expense of the second party, and the cost for like services in and from the United States shall be borne by the first party, provided such advertising and telegraphing is done with its consent.

12. Accounts.

(a.) The first party shall render to the agent of the second party at Tacoma within two weeks of the departure of the steamship from Tacoma, or sooner if possible, an account showing the earnings of the steamship inwards and outwards on that voyage, and the balance shall be paid at once by the party owing. Each round
48 trip (inwards and outwards) shall be kept separate. Accounts for the passenger traffic shall be settled through the general office at St. Paul as promptly as possible.

(b.) An account for commission due to the agents of the parties hereto under clause 7, shall be made by the first party as promptly as practicable after the steamer's departure from Tacoma and the same shall be paid at once by the party owing.

(c.) All accounts shall be rendered in triplicate.

13. Sailing ships.

Commencing from the first of January, 1893, it is understood and agreed between the parties hereto that sailing ships shall not be put on berth in China or Japan on behalf of the first party, except in the event of the break-down of the steamships of the second party, or of special circumstances which may render the use of sailing ships necessary to the preservation of the interests of all parties hereto; in which event the placing of sailing ships on the berth shall be first mutually agreed on between the two parties hereto.

14. Alliance with other lines.

During the period of this agreement the second party shall not enter into an alliance with any other trans-continental railway company, and the first party shall not form an alliance with any other Asiatic steamship line to or from Tacoma, except that the second party may, to prevent the establishment of another competing line arrange to run a line of steamers in connection with the Union Pacific Railway Company, to and from Portland, Oregon, with the understanding and agreement that such line, if established, shall be on no better terms as to railway divisions or rates and that the service rendered by the steamers shall be no better or the sailings more frequent, and that the sailing dates shall be so arranged as not to interfere with the Tacoma line.

15. Detention of ships.

49 Unavoidable delay arising from breakdown or loss of the steamships or from excessive bad weather shall not be deemed a breach of this contract.

16. Transfer of contract.

Either party shall have authority to transfer this contract to another responsible firm or company with the consent of the other party.

17. Duration of agreement.

(*a.*) This agreement shall be binding on both parties for the term of ten (10) years from the date hereof, but the second party shall have the option of withdrawing its steamships and of terminating this agreement at the end of the second year, or at the end of each succeeding second year of the above period, provided the second party gives to the first party one year's notice, in writing, of its intention to withdraw its steamships and to terminate this agreement.

(*b.*) The first party may call for arbitration to determine its right to cancel contract upon giving one year's notice of its desire to do so provided the line is not kept up to the standard that will permit of its being fairly worked in competition with other trans-Pacific lines.

18. Interstate commerce law.

Nothing in this agreement shall be permitted to conflict with the provisions of the interstate commerce act, a law passed by the Government of the United States. It is therefore agreed and understood that this agreement shall be at all times subservient to the requirements of that law and shall be modified arbitrarily to conform to its provisions should it become necessary to do so.

19. Settlement by arbitration.

Any disputes arising out of the terms of this agreement shall be settled by arbitration. One arbitrator to be selected by each party and the two so selected to choose a third, the decision of the majority of the arbitrators to be final and conclusive by the parties hereto.

In witness whereof these presents have been executed by the parties hereto:

NORTHERN PACIFIC RAILROAD CO.,
By J. M. HANNAFORD,
*General Traffic Manager.*

Witness:
JOS. H. BOLTON,
*St. Paul, Minnesota.*

THE NORTHERN PACIFIC STEAMSHIP CO.,
By R. BARNWELL, *Manager.*

Witness:
GEO. HOLMAN,
6 *Great Winchester Street, London, Solicitor.*
J. L. WILSON,
113 *Cannon Street, London, Gentleman.*

NORTHERN PACIFIC RAILROAD COMPANY,
By T. F. OAKES, *President.*

Attest:
[SEAL.] GEO. H. EARL, *Secretary.*

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To all to whom these presents shall come:

I, John William Peter Jauralde, of the city of London, notary public duly admitted and sworn, do hereby certify that the annexed agreement was signed at the city of London aforesaid on this nineteenth day of May, one thousand eight hundred and ninety-two, by Richard Barnwell as manager of the Northern Pacific Steamship Company, party of the second part therein named, before me the said notary, and in the presence of George Holman and James Lupton Wilson, both of this city, witnesses thereunto subscribing.

In faith and testimony whereof I have hereunto set my hand and seal of office at London, this nineteenth day of May, one thousand eight hundred and ninety-two.

[SEAL.] J. W. P. JAURALDE, *Not. Pub.*

Endorsed: Filed September 16, 1893. Edw. Kurtz, clerk. U. S. circuit court, Filed April 17, 1901. John A. Shields, clerk.

(Here follow bills of lading marked pages 51 and 52.)

53 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the borough of Manhattan, in the city of New York, on Monday, the 16th day of December, in the year of our Lord one thousand nine hundred and one.

Present: The Honorable Hoyt H. Wheeler, judge.

THE FARMERS' LOAN AND TRUST COMPANY
*vs.*
NORTHERN PACIFIC RAILROAD COMPANY in the Matter of Intervention of the American Trading Company.

This cause coming on to be heard, Frederic B. Jennings, Esq., is heard on behalf of the intervenor; Edward B. Hill, Esq., is heard on behalf of the Northern Pacific Railroad Company; Howard Van Sinderin, Esq., is heard on behalf of the intervenor in reply.

*C. A. V.*

54 United States Circuit Court, Southern District of New York.

FARMERS' LOAN AND TRUST COMPANY
*vs.*
NORTHERN PACIFIC RAILROAD COMPANY; Intervention of American Trading Company. } In Equity.

The Northern Pacific Railroad Company had a contract with the Northern Pacific Steamship Company for interchange of traffic between points in the United States and Asiatic ports, by the terms of which the railroad company had the exclusive right to appoint agents in the United States, and the steamship company thereby authorized the railroad company "and its appointed agents to act as

agents for" it, "and to issue bills of lading and passenger tickets and to make and name rates on all traffic for the Asiatic points served by the steamships." The receivers of the railroad company, authorized by the court to carry on its business, continued to act under this arrangement and had an agent at New York. In September, 1894, during the war between China and Japan, the intervenor, the trading company, obtained of him rates which it accepted for carrying 200 tons of pig lead from Newark, N. J., by steamship from Tacoma, sailing October 30 to Yokohama, Japan. The freight was paid to the receivers, a bill of lading, "subject to delay,"
55 was delivered to the trading company and received without objection and negotiated, and the lead was forwarded to Tacoma and seasonably put on board the steamship to sail for Yokohama October 30th. The deputy collector refused to clear the vessel with the lead on board as contraband of war, and it was unloaded and left. The next vessel refused to take it, and when it arrived at Yokohama it had fallen $26,704.02 from the contract price, at which it was to be received from the steamship sailing October 30th. This petition is brought to charge those who have by sale under decree received the property from, and subject to the obligations of, the receivers with this loss.

It is obvious from this brief statement that the delay and consequent loss arose from the official act of the deputy collector lawfully authorized whether well founded or not, with reference to the nature and uses of this very property, and not from anything done or omitted by or for the receivers. The granting of the clearance was within the jurisdiction and authority of the collector and the departure without one was prohibited by law, and would have exposed the master of the vessel to a penalty (Rev. Stat., sec. 4197). The refusal, although not well founded, was not within the control or responsibility of the receivers, as it did not relate to anything with which they had to do, but only to the nature of this shipment. The case in this respect is like New York, N. H. & H. Railroad Co. vs. Baker, 98 Fed., 694, where a passenger was injured on the tracks of another road on the line of the plaintiff in error by the negligence of those engaged under a law of the State in changing tracks; and it was held, reviewing the cases where carriers had been holden for what occurred on the lines of others, that the law excused the plaintiff in error for what was being done, although negligently, under it. The circuit court of appeals said: Lacombe, *J.*: "It will be observed that through all these cases there was an element of
56 choice—the power to act or to refrain from acting." And after asking if the other company would have been liable if the plaintiff had been one of its passengers, answered, "We think not. That road had no choice left to it." Here the steamship, if the receivers were responsible for its movements, had no choice left to it but to leave the lead. That was detained by the superior power of the Government.

It is said that it belonged to the receivers to provide for the clearance of the vessel, which might be true as to anything else; but it

would seem that the shipper could not complain of the carrier for the want of a clearance which the nature of the shipment prevented.

The trading company claims that earlier notice of the situation should have been given but there is nothing to show that it would have saved, or have given opportunity to save any part of the loss, or that an earlier shipment would. This view obviates examination as to whether the receivers were liable beyond delivery to the steamship company.

Petition of intervention dismissed.

HOYT H. WHEELER, *Judge.*

Frederick B. Jennings, Howard Van Sinderen, for petitioner.
Edward B. Hill, for petitionee.

(Endorsed): Circuit court of the United States, southern district of New York.—Farmers' Loan and Trust Co. vs. Northern Pacific R.R.Co.—Intervention of American Trading Co.—Opinion, Wheeler, J.—U. S. circuit court southern district of New York.—Filed Jan. 18, 1902.—John A. Shields, clerk.

57 Circuit Court of the United States, Southern District of New York.

THE FARMERS' LOAN AND TRUST COMPANY *against* NORTHERN PACIFIC RAILROAD COMPANY ET AL.

In the Matter of the Intervention of THE AMERICAN TRADING COMPANY.

This cause upon the intervention of the American Trading Company came on to be heard at this term, and was argued by counsel for the intervener and for the Northern Pacific Railway Company; and, thereupon, on consideration thereof, it is

Ordered, adjudged and decreed that the intervening petition of the American Trading Company herein be, and the same is hereby dismissed; and it is further ordered, adjudged and decreed that the Northern Pacific Railway Company have and recover against the American Trading Company the sum of fifty-five dollars and thirty-five cents costs and disbursements as taxed, and have execution therefor.

HOYT H. WHEELER,
*U. S. Judge.*

(Endorsed:) United States circuit court, southern district of New York.—The Farmers' Loan and Trust Co. vs. Northern Pacific R. R. Co. *et al.*, in the matter of the intervention of the American
58 Trading Company.—Decree and notice of settlement.—Howard Van Sinderen, solicitor for American Trading Company, 35 Wall street, New York city.—Due service of a copy of the within is hereby admitted.—Dated 24th day of Jan., 1902.—Sullivan & Cromwell, atty's for def't.—U. S. circuit court.—Filed Jan. 30, 1902.—Southern district of New York.—John A. Shields, clerk.

Circuit Court of the United States, Southern District of New York.

THE FARMERS' LOAN AND TRUST COMPANY
*against*
NORTHERN PACIFIC RAILROAD COMPANY ET AL.

In the Matter of the Intervention of THE AMERICAN TRADING COMPANY.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

The American Trading Company, the intervenor, complainant, conceiving itself aggrieved by the final decree made herein and filed in the office of the clerk of the circuit court of the United States for the southern district of New York on or about the 31st day of January, 1902, whereby it was adjudged that the petition of intervention be dismissed and that the Northern Pacific Railway Com-
59 pany recover against the American Trading Company the sum of fifty-five dollars and thirty-five cents, costs and disbursements, hereby appeals from said decree to the United States circuit court of appeals for the second circuit, for the reasons specified in the assignment of errors, which is herewith filed, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the second circuit.

Dated New York, January 31, 1902.

HOWARD VAN SINDEREN,
*Solicitor for the American Trading Company.*

The foregoing appeal is hereby allowed.
Dated February 5, 1902.

E. H. LACOMBE,
*United States Circuit Judge.*

(Endorsed:) United States circuit court, southern district of New York.—The Farmers' Loan & Trust Co. against Northern Pacific R. R. Co. *et al.*—In the matter of the intervention of American T. Co.—Petition for leave to appeal and order thereon.—Howard Van Sinderen, solicitor for Am. T. Co., 35 Wall St., New York city.—Due service of a copy of the within is hereby admitted. Dated 6th day of Feb'y, 1902.—Sullivan & Cromwell, atty's for N. P. R. R. Co.—U. S. circuit court, southern district of New York.—Filed Feb. 6, 1902.—John A. Shields, clerk.

60 Circuit Court of the United States, Southern District of New York.

THE FARMERS' LOAN AND TRUST COMPANY
*against*
NORTHERN PACIFIC RAILROAD COMPANY ET AL.

In the Matter of the Intervention of THE AMERICAN TRADING COMPANY.

Comes now The American Trading Company, the intervenor, complainant, by Howard Van Sinderen, its solicitor, and files the following assignments of error in this cause:

First. The court erred in finding and deciding that the delay in the transportation to and delivery at Yokohama, Japan, of the pig lead referred to in the case, and the consequent loss to the American Trading Company, arose from the official act of the deputy collector of the United States at the port of Tacoma lawfully authorized, with reference to the nature and uses of this very property.

Second. The court erred in finding and deciding that the delay or consequent loss did not arise from anything done or omitted by or for the receivers.

Third. The court erred in finding and deciding that the refusal of the deputy collector to clear the ship with the lead on board was not within the control and responsibility of the receivers, and
61 that it did not relate to anything with which they had to do, but only to the nature of the shipment.

Fourth. The court erred in finding and deciding that the steamship, if the receivers were responsible for its movements, had no choice left to it but to it leave the lead.

Fifth. The court erred in finding and deciding that the want of clearance was due to the nature of the shipment.

Sixth. The court erred in finding and deciding that there is nothing to show that earlier notice to the American Trading Company, of the delay at Tacoma, would have saved, or have given opportunity to save, any part of the loss, or that an earlier shipment would.

Seventh. The court erred in dismissing the petition of intervention.

Eighth. The court erred in not finding and deciding that the contract under which the lead was shipped, imposed upon the receivers the obligation to deliver the lead at Yokohama, Japan, as provided therein.

Ninth. The court erred in not finding and deciding that time was of the essence of the contract.

Tenth. The court erred in not finding and deciding that the delay in transportation and the consequent loss to the American Trading Company were due to the negligence of the receivers.

Eleventh. The court erred in not finding and deciding that the claim of the American Trading Company, amounting to $26,704.02 and interest, should be paid by the Northern Pacific Railway
62 Company, and that in default thereof, the same should be enforced pursuant to the final decree of foreclosure in the

consolidated cause, and in not granting a decree in accordance with the prayer of the petition.

Wherefore, The American Trading Company, intervener, complainant, prays for a reversal of the decree entered in the office of the clerk of the circuit court of the United States for the southern district of New York, on or about January 31, 1902, and for a direction for the entry of a decree in accordance with the prayer of its petition of intervention, and for such other relief as may be equitable.

Dated New York, January 31, 1902.

HOWARD VAN SINDEREN,
*Solicitor for the American Trading Company,*
35 *Wall Street, New York.*

(Endorsed:) United States circuit court, southern district of New York.—The Farmers' Loan & Trust Co. against Northern Pacific R. R. Co. *et al.*—In the matter of the intervention of the American Trading Company.—Assignments of error.—Howard Van Sinderen, solicitor for Am. T. Co., 35 Wall street, New York city.—U. S. circuit court, southern district of New York.—Filed Feb. 5, 1902.—John A. Shields, clerk.

Know all men by these presents, that we, the American Trading Company, a corporation organized under the laws of the State of Connecticut, as principal, and the American Bonding and Trust Company of Baltimore City, a corporation duly organized under the laws of the State of Maryland, having an office at 253 Broadway, borough of Manhattan, city and State of New York, as surety, are held and firmly bound unto the Northern Pacific Rail-
63 way Company in the sum of two hundred and fifty ($250) dollars, to be paid to the said Northern Pacific Railway Company, its successors and assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 4th day of February, 1902.

Whereas, the American Trading Company has appealed to the circuit court of appeals of the United States for the second circuit from a final decree entered in the office of the clerk of the circuit court of the United States for the southern district of New York, on or about January 31, 1902, dismissing the petition of intervention of the American Trading Company in the suit wherein The Farmers' Loan and Trust Company is complainant and The Northern Pacific Railroad Company and others are defendants, and for the sum of fifty-five and $\frac{35}{100}$ ($55.35) dollars costs.

Now, therefore, the condition of this obligation is such that if the above named The American Trading Company shall prosecute its said appeal to effect, and answer all damages and costs if it shall

fail to make its plea good, then this obligation to be void, otherwise to remain in full force and virtue.

THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY, [SEAL.]
By HOWARD ABRAHAMS, *Vice-President.*

Signed and sealed in presence of
P. A. NOLAN.

Attest: HENRY J. SAGE,
*Assistant Secretary.*

THE AMERICAN TRADING CO.
WM. H. STEVENS, *Treas.* [SEAL.]

64 STATE OF NEW YORK, } *ss:*
*City and County of New York,* }

On the 4th day of February, 1902, before me personally came Howard Abrahams, to me known, who being by me duly sworn, did depose and say: That he resided in the city of New York; that he is the vice-president of the American Bonding and Trust Company of Baltimore City, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, of chapter 720, of the Session Laws of New York, for the Year 1893. And the said Howard Abrahams further said that he was acquainted with Henry J. Sage, and he knew him to be the assistant secretary of said company; that the signature of said Henry J. Sage subscribed to the within instrument is the genuine handwriting of the said Henry J. Sage, and was subscribed thereto by like order of the board of directors, in the presence of him the said Howard Abrahams.

[SEAL.] PHILIP H. FETT,
*Notary Public* (*No.* 34), *Kings Co.*

Certificate filed in New York Co.

65 *Statement of the American Bonding and Trust Company of Baltimore City at the Close of Business, December* 31*st*, 1901.

Financial statement.

| | |
|---|---|
| Capital paid in | $1,000,000 00 |
| Stockholders' liability | 1,000,000 00 |
| Reserve for reinsurance | 260,657 82 |
| Surplus and undivided profits | 325,300 15 |
| Total | $2,585,957 97 |

*Assets.*

| Par value. | | Market value. |
|---|---|---|
| 55,500. | —Baltimore City stock (bonds), 3½ per cent., 1945 | $62,715 00 |
| 357,000. | —Baltimore City stock (bonds), 3½ per cent., 1940 | 401,625 00 |
| 20,400. | —Baltimore City stock (bonds), 3½ per cent., 1930 | 22,542 00 |
| 58,000. | —Baltimore City stock (bonds), 3½ per cent., 1928 | 64,090 00 |
| 14,800. | —Baltimore City stock (bonds), 6 per cent., 1902 | 14,800 00 |
| 6,000. | —Baltimore City stock (bonds), 4 per cent., 1920 | 6,780 00 |
| 3,000. | —Baltimore City stock (bonds), 4 per cent., 1925 | 3,510 00 |
| 6,600. | —Baltimore City stock (bonds), 5 per cent., 1916 | 8,052 00 |
| 85,000. | —United R'y & Electric Co. of Baltimore City, 4 per cent. gold bonds, 1949 | 80,750 00 |
| 10,000. | —Baltimore & Ohio S. W. bonds, 3½ per cent., 1925 | 9,150 00 |
| 50,000. | —City of Mobile, Ala., bonds, 4½ per cent., 1939. | 54,000 00 |
| 25,000. | —City of Richmond, Va., bonds, 4 per cent., 1926, 1929 | 26,750 00 |
| 25,000. | —Norfolk county, Va., bonds, 5 per cent., 1907.. | 26,125 00 |
| 10,000. | —City of Norfolk, Va., bonds, 5 per cent., 1912.. | 10,800 00 |
| 2,000. | —City of Manchester, Va., bonds, 5 per cent., 1929 | 2,140 00 |
| 8,500. | —City of Cumberland, Md., bonds, 4 per cent., 1901–1907 | 8,500 00 |
| 18,000. | —City of Snow Hill, Md., bonds, 6 per cent., 1906–1923 | 18,900 00 |
| 25,000. | —State of Georgia bonds, 4½ per cent., 1915 | 28,625 00 |

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| | | |
|---|---|---|
| 25,000. | —State of Tennessee bonds, 3 per cent., 1913... | $23,750 00 |
| 69,762.44. | —City of New Orleans, 6 per cent. certificates | 69,762 44 |
| 75,000. | —W. Va. Central and Pittsburg R'y Co., 6 per cent. mtge. bonds | 86,625 00 |
| 200. | —Shares Continental Trust Co. of Baltimore.. | 46,000 00 |
| 150. | —Shares Merchants' National Bank of Baltimore | 29,775 00 |
| | Outstanding premiums, less commissions... | 77,127 32 |
| | Accounts receivable, secured | 112,597 96 |
| | Interest accrued | 25,351 23 |
| | Real estate | 27,131 91 |
| | Furniture and fixtures | 1 00 |
| | Mortgage loans | 111,809 63 |

| | |
|---|---|
| Time loans | 6,910 00 |
| Call loans | 141,110 61 |
| Cash in office and depositories | 95,885 31 |
| | $1,703,691 41 |

*Liabilities.*

| | | |
|---|---|---|
| Capital stock | | $1,000,000 00 |
| Collateral deposits | | 51,836 12 |
| Agents' credit balances | | 4,913 75 |
| Special reserve for reported losses, proofs not filed | | 60,983 57 |
| Legal reserve | $260,657 82 | |
| Surplus and undivided profits | 325,300 15 | |
| | | 585,957 97 |
| | | $1,703,691 41 |

STATE OF NEW YORK, }
*City and County of New York,* } *ss:*

Howard Abrahams, being duly sworn, says: That he is the vice-president of the American Bonding and Trust Company of Baltimore City; that the foregoing is a true and correct statement of the financial condition of said company, as of December 31, 1901, to the best of his knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

HOWARD ABRAHAMS.

Subscribed and sworn to before me this 4th day of February, 1902.

PHILIP H. FETT,
[SEAL.] *Notary Public* (*No.* 24), *Kings Co.*

Certificate filed in New York Co.

67 Form 026.

Local Board, Special.

*Extracts from Charter of the American Bonding and Trust Company of Baltimore City.*

"The said company shall be and is hereby authorized and empowered to insure the fidelity of persons holding places of trust or responsibility to or under any State, county, city, corporation, person or persons whatsoever; to become security for the faithful performance of any trust, office, duty, contract or agreement, and to supersede any judgment to go on any appeal or other bond."

* * * * * * *

"That the directors shall * * * elect from their number * * * an executive committee."

The executive committee so chosen * * * shall have power to elect non-resident local boards, non-resident local vice-presidents and non resident local assistant secretaries * * * with power

to sign and deliver bonds of suretyship and other obligations for and on behalf of and in the name of said company to the same effect and with the same binding obligations as if the said instruments had been executed by the president or vice-president and secretary or assistant secretary. * * *"

* * * * * * *

Extract from minutes of a meeting of the executive committee held at the office of the company at Baltimore, Maryland, on the 4th day of November, 1901.

Mr. Ernest Hoen, Jr., presented the following resolution, seconded by Mr. James S. Woodside:

"Preamble.—Whereas, in virtue of certain resolutions dated the "8th day of August, 1899, William P. Flanders and James G. Brown "were declared appointed or elected vice-presidents, and Henry J.
"Sage, Hulbert T. E. Beardsley, Edward B. Southworth, Jr.,
68 "and Philip H. Fett were declared appointed or elected assist-
"ant secretaries to serve in the city of New York, State of New "York; now, therefore,

"*Resolved*, That said appointment or election of said persons, for "reason, is hereby declared null and void, and all powers granted "under said resolution are hereby revoked; to more definitely de- "termine the purpose and intention of said annul*l*ment and revoca- "tion, be it further

"*Resolved*, That Howard Abrahams, of New York city, New York, "and Henry J. Sage, of the same place, be and are hereby appointed "resident vice-president and assistant secretary, respectively, of this "company at New York city, New York, with power to execute "bonds on behalf of the company for its business and in accordance "with its charter. That in the absence of the said Howard Abra- "hams, William P. Flanders, of the same place, be, and he is hereby "authorized to act as resident vice-president with the same power as "the said Howard Abrahams; and that in the absence of the said "Henry J. Sage, either Hulbert T. E. Beardsley or Edward B. South- "worth, Jr., of the same place, be and are hereby authorized to sign "all bonds and undertakings issued by the company as assistant sec- "retary, in attestation of the seal of the company affixed thereto.

"The question being put, all the members present voted in the "affirmative, the motion was declared adopted."

I, Samuel H. Shriver, secretary of the American Bonding and Trust Company of Baltimore City, hereby certify that the foregoing are true and correct copies taken from the records of the American Bonding and Trust Company of Baltimore City.

In witness whereof, I have hereunto subscribed my name and affixed the corporate seal of the American Bonding and Trust Company of Baltimore City, at Baltimore, Maryland, this 6th day of November, 1901.

[SEAL.] SAMUEL H. SHRIVER, *Secretary.*

69 (Endorsed:) Circuit court of the United States, southern district of New York.—The Farmers' Loan and Trust Company against Northern Pacific Railroad Company.—In the matter of the intervention of the American Trading Company.—Bond on appeal.—Howard Van Sinderen, 35 Wall street, N. Y., att'y.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the appellee of the right at any time to examine the proper officers of the surety company under oath, touching their assets, liabilities and financial condition generally. E. H. Lacombe, U. S. circuit judge.—U. S. circuit court, southern district of New York.—Filed Feb. 5, 1902.—John A. Shields, clerk.

By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To the Northern Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear before a United States circuit court of appeals for the second circuit, to be holden at the borough of Manhattan in the city of New York, in the district and circuit above named, on the 4th day of March, 1902, pursuant to a petition of appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The American Trading Company, intervenor, is appellant, and you are appellee, to show cause, if any there be, why the decree in said cause mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 5th day of February, in the year of our Lord one thousand nine hun-
70 dred and two, and of the Independence of these United States the one hundred and twenty-sixth.

E. H. LACOMBE,
*Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.*

(Endorsed:) United States circuit court of appeals for the second circuit.—The American Trading Company, intervenor, appellant, *vs.* Northern Pacific Railway Company, appellee.—Original citation.—Due service of a copy of the within is hereby admitted. Dated 6th day of Feb'y, 1902. Sullivan & Cromwell, att'ys for N. P. R. R. Co.—U.S. circuit court, southern district, New York.—Filed Feb. 6, 1902.—John A. Shields, clerk.

UNITED STATES OF AMERICA,
*Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to seventy inclusive, contain a true and complete transcript

of the record and proceedings had in said court, in the cause entitled The Farmers' Loan and Trust Company against Northern Pacific Railroad *et al.*, appellee-, in the matter of the intervention of The American Trading Company, appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 19th day of February, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-sixth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

71 United States Circuit Court of Appeals for the Second Circuit, October Term, 1902.

Submitted December 4, 1902; decided January 15, 1903.

THE FARMERS' LOAN AND TRUST Company, Complainant, Appellee,

*vs.*

THE NORTHERN PACIFIC Railroad Company *et al.*, Defendants, Appellees; The American Trading Company, Intervenor, Appellant.

No. 30. Appeal from the Circuit Court of the United States for the Southern District of New York. Before Judges Wallace, Lacombe, and Townsend.

TOWNSEND, *Circuit Judge:*

This is an appeal from a decree of the United States circuit court for the southern district of New York, dismissing the petition of the American Trading Company for the recovery of its claim against the receivers of the Northern Pacific Railroad Company. The decree under which the property of said corporation was sold provided that such sale should be subject to all obligations or liabilities contracted or incurred by said receivers, and that such claims might be enforced by such a petition in this court.

The case was tried to the court without a jury upon an agreed statement of facts from which, *inter alia*, it appeared that at the time of the transactions in question the receivers of the Northern Pacific Railroad Company were carrying on the business of said road under authority of said court; that the road in their possession ex-
72 tended from Duluth, Minnesota, to Tacoma, Washington; that under contracts with carriers they issued through bills of lading to and from points outside of their line, and that among such carriers was the Northern Pacific Steamship Company, an English company operating a line of steamers between Tacoma and points in Japan, including Yokohama; that the freight business of said railroad company over its railroad and outside connections in the eastern part of the United States was in charge of one George R. Fitch, the general eastern agent of the receivers, at their office in the

city of New York; that his only authority to act as agent of said steamship company was under a contract between the railroad company and the steamship company, but that he had been instructed by said receivers to solicit freight and issue such bills of lading as the one herein involved, providing for through transportation by said railroad company and steamship company, and that he had no express general authority to make such contracts except as provided in said bills of lading, and no express authority to make the contract herein unless by virtue of certain telegrams to be hereinafter set forth; and that the petitioner herein did not know that the steamship company was a separate and independent company.

The material part of the agreed statement as to the transaction in question is as follows:

"5. In September, 1894, the trading company applied to Fitch for a rate upon a proposed shipment of pig lead from New York to Yokohama, Japan, and informed him that it was of vital importance that the lead should be transported promptly and go forward by the earliest possible steamer without delay, in order to enable the trading company to fulfil a proposed agreement which it was about to make for the sale of the lead in Japan, and which would require its delivery there at a fixed date. Fitch thereupon named a rate, and undertook to forward the lead from New York on or before September 29th, and via the Northern Pacific steamer *Tacoma* sailing from Tacoma October 30, 1894."

73 The petitioner thereupon accepted Fitch's proposition, purchased said lead in bond and closed said proposed agreement for the sale of said lead.

Fitch subsequently wrote the petitioner confirming contract for shipment "to be forwarded from New York on or before September 29th, in accordance with shipping instructions given you by me, and to be forwarded from Tacoma, Wash., via Northern Pacific steamer sailing from thence October 30th," which the petitioner accepted in a letter repeating the aforesaid terms, and it arranged for shipment in accordance with Fitch's request to "see that same are rushed through without delay to connect with our steamer at Tacoma."

On September 24, 1894, Fitch informed the trading company that he declined to ship the lead upon the ground that it might be contraband of war, and thereupon on the same day the trading company wrote him a letter stating that they would hold his company responsible for any loss from failure to fulfill the contract.

Thereupon Fitch notified the general freight agent of the receivers and received the following telegram in reply:

"SEPTEMBER 25, 1894.

"G. R. Fitch, 319 Broadway, New York:

"Your wire this date to Mr. Hannaford: Dodwell, Carlill & Co. have consented to accept the lead already contracted. Do not contract for any more. Advise quick number of pounds contracted by

you and say how it will be routed. Think we should receipt for lead subject to delay.

0–900 J. B. BAIRD. WDB."

Dodwell, Carlill & Company represented the steamship company. Thereupon the refusal was withdrawn and the shipment was made under said contract, the lead being in course of transportation
74 on the afternoon of September 27th, and reached Tacoma in time for shipment as agreed on the steamer sailing October 30th. On September 28, 1894, petitioner gave Fitch its check for the freight and Fitch subsequently delivered a bill of lading in the usual printed form, but upon which were stamped the words "subject to delay," to a clerk of the petitioner, who received it without any stated objection to its terms, and it was not read or examined by him or by any officer of the company, and was immediately hypothecated for moneys borrowed thereon. Said cheque was payable to the order of the Northern Pacific railroad, was endorsed by Fitch as general eastern agent, and the proceeds were remitted to said receivers and were divided and distributed under said contract with the steamship company.

On September 29th, Fitch sent a copy of said bill of lading to the agent of said steamship company with the following letter:

"SEPTEMBER 29, 1894.

"Dodwell, Carlill & Co., Tacoma, Wash.

"GENTLEMEN: I hand you herewith my B–L 1507 covering shipment of pig lead for export to Amer. Trading Co., Yokohama, Japan. As I have previously advised you, I have made contract guaranteeing delivery of this shipment at Yokohama by our S. S. *Tacoma* sailing October 30th. Will you kindly see that this connection is made, without fail.

Yours truly,

(S'g'd) GEO. R. FITCH, *G. E. A.*"

At Tacoma the lead was delivered by the receivers to the Northern Pacific Steamship Company and was loaded upon the *Tacoma*, the vessel of the steamship company which was to sail on October 30th; but about four o'clock in the afternoon of that day, the deputy collector of the port refused to clear the vessel while the lead was on board upon the ground that it was contraband of war, and telegraphed to the collector of Port Townsend for instructions.
75 On the following day the deputy collector at Tacoma received a telegram for the collector at Port Townsend advising that the shipment be permitted.

In the meantime the master of the vessel had unloaded the lead, which delayed the ship until 9 a. m. on the morning of October 31st, when he sailed without it.

The petitioner was not notified of the delay in the transshipment of the lead until November 5th, 1894.

The lead went forward on a later vessel, but in consequence of the delay the purchaser refused to receive the shipment and in conse-

quence the petitioner was obliged to sell it in the open market and thereby suffered a loss of $26,704.02.

The petitioner contends that the original contract for through transportation was within the scope of Fitch's authority as general eastern agent of the receivers, and was within the scope of the general powers of the receivers under the order of court; that it was adopted and ratified by the receivers; and that the failure to perform was due to their negligence and was not excused by the refusal of the deputy collector to clear the ship.

Counsel for the receivers contend that there was no agreement that the receivers should assume responsibility except over their line of railway; that the receivers had no power to make such a contract; that if Fitch made any such contract it was for the steamship company and not for the receivers; that he had no authority to make any contract on behalf of the receivers for the carriage of goods beyond Tacoma; that the original agreement was merged in the bill of lading; that failure to perform was excused by impossibility of performance.

The receivers, under the order of court, were authorized to continue the business of the railroad system of said company; that is, to conduct the business of a common carrier. And receivers acting within the scope of their authority are clothed with substantially the same powers and are subject to substantially the same liabilities as such receivers as those applicable to the corporation. *Farlow v. Kelly* (108 *U. S.*, 288); *Beers v. Wabash, St. L. & P. R'y. Co* (34 *Fed.*, 243, 247); *Elliott on Railroads* (*sections* 567, 576), and cases
76 cited; *Hutchinson on Carriers* (*section* 67); *Beach on Receivers* (*section* 371); *Central Trust Co. v. N. Y. C. & H. R. R. R.* (110 *N. Y.*, 250, 257); *Little, Rec'r v. Dusenberry, Adm.* (46 *N. J. Law Reps.*, 614); *Wall v. Platt* (169 *Mass.*, 398, 400.) A carrier may contract for transportation beyond its own route and assume liability for the entire distance over connecting lines to the same extent as over its own line. *R. R. v. Pratt* (22 *Wall.*, 123); *R. R. v. McCarthy* (96 *U. S.*, 258). No reason is apparent why receivers have not the same power, and the authorities so far as cited are to that effect. *Kansas Pacific R'y Co. v. Bayles* (19 *Colo.*, 358; 35 *Pac. Rep.* 744; *Elliott on Railroads, supra*).

Under the order of court authorizing them to conduct the business of common carriers, it was their right to so manage the property as would in their judgment secure the best results consistently with the proper discharge of their duties. Under this authority they could and did issue through bills of lading beyond their route and by the steamers of the steamship company.

In *Myrick v. Michigan Central R. R. Co.* (107 *U. S.*, 102), the court says:

"Any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence."

If Fitch had authority to make the agreement undertaken by him, its terms are sufficiently clear and certain to meet this rule.

Fitch was the general eastern freight agent of the receivers. It has been held that it is within the power of a general freight agent to contract for the carrying of goods beyond the limit of the carrier's line: *White v. M. P. R. Co.* (19 *Md. App.*, 400); *Grover & Baker Sewing Machine Co. v. Mo. Pacific R. R. Co.*, (70 *Mo.*, 672); and to stipulate for forwarding goods by a certain vessel and for
77 carrying within a specified time. *Goddard v. Mallory* (52 *Barb.*, 87, 95); *Goodrich v. Thompson* (44 *N. Y.*, 324); *Strohn v. Detroit, &c., R. R.* (23 *Wis.*, 126).

It is elemental that as to third parties dealing with such a general agent, thus representing a corporation in the management of its business, and acting within the scope of his apparent authority, the principal is bound to the same extent as though it had directly conducted the business itself. *Isaacson v. N. Y. C. & H. R. R. Co.* (94 *N. Y.* 278); *Pechner v. Phœnix Insurance Co.* (65 *N. Y.*, 195).

And so far as appeared from said course of dealing and from said bills and so far as this petitioner knew or had reason to know said steamers were owned and operated by said receivers.

In any event the receivers having first expressly authorized Fitch to accept a certain rate for this shipment to Yokohama and having afterwards attempted to cancel said quotation, upon notice of the petitioner's refusal to ship and of their claim under a written contract already given, without any further enquiry as to the terms of said contract except as to the number of pounds and route, authorized Fitch to accept the lead already contracted, and suggested to Fitch, but did not instruct him, that the receipt for lead should be subject to delay. That the receivers knew that the contract provided for shipment per steamship *Tacoma* on October 30th, may perhaps be inferred from their telegram to Fitch on September 25th, asking for such information. Thus having all the knowledge of the facts which they desired, they authorized the shipment and under said authority the "shipment was made under the contract," in bond.

It sufficiently appears that the contract was made by Fitch on behalf of and was ratified by the receivers, and that it provided for shipping the goods by steamer sailing October 30th.

But counsel for the receivers claims that said written contract was merged in the bill of lading.

78 That the mere receipt of a bill of lading does not affect or alter a prior contract under which goods have been actually shipped and are in course of transit without actual consent to such a change is well settled. *Missouri Pacific Railway Co. v. Barnes* (30 *Kansas*, 298; *Swift v. Pacific Mail Steamship Co.* (106 *N. Y.*, 206; *Railroad Co. v. Manufacturing Co.* (16 *Wall.*, 318); *Gains v. Union Trans. Ins. Co.* (28 *Ohio St.*, 418).

In *Bostwick v. B. & O. &c.* (45 *N. Y.*, 712), goods were shipped under the same conditions as herein shown, namely, a through freight contract by an agent, beyond the route of the defendant railroad, and with a later receipt of bills of lading. A loss having occurred,

defendant claimed exemption under the conditions of bill of lading. But the court said:

"The rule that prior negotiations are merged in a subsequent written contract does not apply to such a case as this."

Before the issuance of the bill of lading the petitioner, relying upon said prior contract, had made its engagement to deliver at Yokohama at a fixed date, had bought the load, paid the through freight, and had surrendered possession and control of it. The shipment was made in bond for exportation at Tacoma, and was secured upon the cars by Government locks and "customs seals." Receivers could not oblige it to consent to a change in its contract.

But counsel for the receivers contends that the subsequent negotiation by petitioner of said bill conclusively shows that the petitioner adopted it and assented to all of its terms. In support of this proposition he cites *Rubens v. Ludgate Hill Steamship Company* (2 *N. Y. Supp.*, 481); and *The Henry B. Hyde* (82 *Fed.*, 681). But in neither of said cases was there any agreement with the shipper prior to the receipt of the bill of lading. In the *Henry B. Hyde* the court expressly says that it is the acceptance of the bill of lading "at the time of the delivery of his goods for shipment" which binds the shipper.

79 The decisive answer to this contention of counsel for receivers is that such acquiescence in or adoption of said bill of lading by petitioner only affects its rights and obligations toward the parties with whom said bill was negotiated. As to them the petitioner is estopped to deny the conditions of the bill upon the familiar principle that one who has thus negotiated such an instrument thereby ratifies its terms and conditions. But we know of no rule by which such ratification can be extended to or taken advantage of by a carrier, in order to annul a prior valid contract under which rights have vested and obligations have accrued. This can only be done by the consent of both parties. As to the carrier the transaction is *res inter alios acta*.

Counsel for the receivers contend and the court below held that the shipment having become impossible temporarily through the act of the deputy collector, the receivers were not bound to provide for a clearance of the vessel, and that, therefore, they are not liable for the delay.

We cannot assent to this proposition in view of the situation of the parties as shown by the admissions on file.

The traffic agreement between the Northern Pacific Railroad Company and the Northern Pacific Steamship Company shows that said steamship company was expressly organized in order to establish a close alliance with said Northern Pacific Railroad Company to control freight traffic between the United States and Japan; that the steamship company was bound to supply steamships according to the exigencies of Northern Pacific traffic; and that the steamship company and railroad company were to conjointly arrange for the receipt of goods at Tacoma and assumption of liability thereon.

Before this contract was made, Fitch had expressed some doubt as to whether, in view of the existing war between China and Japan,

such shipment would be permitted. After the contract was made he had attempted to withdraw therefrom, but upon being
80 notified that petitioner would hold the receivers liable for resulting damages, they secured from the steamship company a contract to accept the lead, and authorized him to carry out the contract.

In these circumstances it was incumbent upon the receivers to at least show that they used all reasonable means to guard against damage resulting from delay by reason of the very risks foreseen and assumed by them. There is nothing in the stipulated facts to show that they took any precautions or exercised any care in advance other than Fitch's letter of September 29th, to the agent of the steamship company, or that, when the contemplated exigency arose, they made any effort to meet it. They assumed the obligation with knowledge of the risks incident to its discharge and the damages likely to result from delay; they reaffirmed it with knowledge that if they did not choose to assume said risks the petitioner would ship by another route and charge the difference in rates; they failed to guard against the happening of said risks, and it does not appear that, after the actual interference with the shipment from Tacoma, they made any attempt to prevent the unloading of the lead for the brief time necessary to obtain instructions from the collector, or to arrange to have it reloaded in case of a favorable report, or to secure any delay in the sailing of the vessel, and they negligently failed to notify the petitioner of the delay for six days thereafter.

The fact stated in the agreed submission, that "neither Fitch nor the receivers knew until September 24th, that any contract for the sale of lead in Japan had been concluded by the trading company," does not affect the measure of damages, because they arranged for said shipment after their knowledge that such a contract had been made, and their agent was informed, before any contract for shipment was made, that such shipment was contemplated in order to fulfil a proposed agreement, which would require its delivery in Japan at a fixed time.

In these circumstances the measure of damages is the difference between the contract price and the actual market value of
81 the goods at the time of delivery. *New York, Lake Erie & Western Railroad Company v. Estill*, and *v. Leonard* (147 *U. S.*, 591, 616); *Messmore v. New York Shot & Lead Company* (40 *N. Y.*, 422); *Booth v. Spuyten Duyvil Rolling Mill Company* (60 *N. Y.*, 489).

Let an order be entered reversing the decree and directing the payment to the intervenor of $26,704.02, with interest thereon from the 4th day of January, 1895, and costs.

*F. B. Jennings*, for the appellant.

*Edward B. Hill*, for the appellee.

82 At a stated term of the United States circuit court of appeals, in and for the second circuit, held at the court rooms in the Post Office building in the city of New York, on the 26th day of January one thousand nine hundred and three.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. William K. Townsend, circuit judges.

FARMER'S LOAN & TRUST COMPANY, Complainant-Appellee,
*vs.*
NORTHERN PACIFIC RAILROAD COMPANY ET AL., Defendants-Appellees; The American Trading Company, Intervenor-Appellant.

Appeal from the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States, for the southern district of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said circuit court be and it hereby is reversed with costs, and with instructions to the circuit court to decree conformably to the opinion of this court.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

W. J. W.
E. H. L.

83 [Endorsed:] United States circuit court of appeals, second circuit. Farmer's Loan & Trust Co. *vs.* Northern Pacific R. R. Co. Order for mandate. United States circuit court of appeals, second circuit. Filed Jan. 26, 1903. William Parkin, clerk.

84 U. S. Circuit Court of Appeals, Second Circuit.

THE FARMERS' LOAN & TRUST COMPANY, Complainant,
*against*
THE NORTHERN PACIFIC RAILROAD COMPANY and Others, Defendants.
} Petition for Appeal.

In the Matter of the Intervention of THE AMERICAN TRADING COMPANY.

The above named appellant, The Northern Pacific Railway Company, by Sullivan & Cromwell, its solicitors, conceiving itself aggrieved by the decree made by the circuit court of appeals in and for the second judicial circuit, entered in the office of the clerk of this court on the 26th day of January, 1903 in the above entitled proceeding, doth hereby appeal from said decree to the Supreme Court of the United States, and prays that its appeal may be allowed, and that a transcript of the record and proceedings upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, March 18, 1903.

SULLIVAN & CROMWELL,
*Solicitors for Appellant.*

85 U. S. Circuit Court of Appeals, Second Circuit.

THE FARMERS' LOAN & TRUST COMPANY, Complainant,
*against*
THE NORTHERN PACIFIC RAILROAD COMPANY and Others, Defendants.

In the Matter of the Intervention of THE AMERICAN TRADING COMPANY.

The foregoing appeal of the Northern Pacific Railroad Company is hereby allowed as prayed.
Dated, April 6 1903.

WM. J. WALLACE,
*Circuit Judge.*

86 [Endorsed:] U. S. circuit court of appeals, second circuit. The Farmers' Loan & Trust Company, complainant, *vs.* The Northern Pacific Railroad Company, and others, defendants. In the matter of the intervention of the American Trading Company. Petition for appeal and allowance. Sullivan & Cromwell, solicitors for appellant, 49 Wall street, New York, N. Y. United States circuit court of appeals, second circuit. Filed April 6, 1903. William Parkin, clerk.

87 United States Circuit Court of Appeals, Second Circuit.

THE FARMERS' LOAN AND TRUST COMPANY, Complainant,
*against*
NORTHERN PACIFIC RAILROAD COMPANY and Others, Defendants.

In the Matter of the Intervention of THE AMERICAN TRADING COMPANY.

*Assignment of Errors.*

Now on the 18th day of March, 1903, comes The Northern Pacific Railway Company, appellant, by Sullivan & Cromwell, its solicitors, and says that in the order or decree of the United States circuit court of appeals for the second circuit entered on the 26th day of January, 1903, there is manifest error in the following particulars, to wit:

*First.* The court erred in deciding that the receivers of the Northern Pacific Railroad Company assumed responsibility for transportation and delivery of petitioner's goods beyond the line of railroad operated by them.

88 *Second.* The court erred in deciding that the receivers had power and authority to contract for transportation beyond the line of railroad operated by them.

*Third.* The court erred in deciding that Fitch entered into an

engagement or undertaking for or on behalf of the receivers to transport and deliver petitioner's goods beyond Tacoma.

*Fourth.* The court erred in not deciding that in making any agreement for the carriage of petitioner's goods beyond Tacoma, Fitch acted solely as the agent of the Northern Pacific Steamship Company.

*Fifth.* The court erred in deciding that Fitch possessed authority, or apparent authority, to contract in behalf of the receivers for transportation and delivery of goods beyond Tacoma.

*Sixth.* The court erred in deciding that the receivers ratified any contract made by Fitch for transportation and delivery of petitioner's goods beyond Tacoma.

*Seventh.* The court erred in deciding that the prior negotiations regarding petitioner's shipment were not merged in and superseded by the bill of lading.

89 *Eighth.* The court erred in not deciding that petitioner assented to, accepted, confirmed and adopted the bill of lading as constituting the contract between the parties.

*Ninth.* The court erred in not deciding that the receivers had fully performed their contract and fulfilled all obligations imposed upon them by due and timely delivery of the petitioner's goods to the Northern Pacific Steamship Company at Tacoma.

*Tenth.* The court erred in deciding that the act of the deputy collector did not make performance impossible and excuse failure to perform.

*Eleventh.* The court erred in deciding that it was incumbent on the receivers to show that they used all reasonable means and precaution to guard against damage from delay.

*Twelfth.* The court erred in deciding that the receivers failed to guard against risks foreseen and assumed by them.

*Thirteenth.* The court erred in not deciding that the contract of the receivers was *ultra vires* and the liability for damages, if any, a personal liability and not one for which the Northern Pacific Railway Company is bound to respond.

90 *Fourteenth.* The court erred in not deciding that the delay in transportation and delivery of petitioner's goods was caused by the official act of the deputy collector of the United States at Tacoma, and not by anything done or omitted by the receivers.

*Fifteenth.* The court erred in not deciding that the delay in transportation was due solely to the nature of the shipment.

*Sixteenth.* The court erred in deciding that the contract under which the petitioner's goods were shipped imposed upon the receivers the obligation to deliver the said goods at Yokohoma, Japan, in due time.

*Seventeenth.* The court erred in reversing the decree of the United States circuit court and directing payment to the intervenor of $26,704.02 with interest.

Wherefore the appellant prays that the said order or decree of the United States circuit court of appeals be reversed, and that the

decree of the United States circuit court may be affirmed and the petition of intervention herein dismissed.

Dated, March 18, 1903.

SULLIVAN & CROMWELL, *Solicitors.*

91 [Endorsed:] U. S. circuit court of appeals second circuit. The Farmers' Loan & Trust Company, complainant, against Northern Pacific Railroad Company, *et al.*, defendants. In the matter of the intervention of the American Trading Company. Assignment of errors. W. J. W. United States circuit court of appeals, second circuit. Filed Apr. 6, 1903. William Parkin, clerk. Sullivan & Cromwell, solicitors for Northern Pacific Railway Company, 49 Wall street, New York city, N. Y.

92 United States Circuit Court of Appeals, Second Circuit.

THE FARMERS' LOAN AND TRUST COMPANY *against* THE NORTHERN PACIFIC RAILROAD COMPANY *et al.*; Intervention of The American Trading Company. } Supersedeas Bond.

Know all men by these presents, that we, The Northern Pacific Railway Company, a corporation organized under the laws of the State of Wisconsin, as principal, and The United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, having an office in the borough of Manhattan, city and State of New York, as surety, are held and firmly bound unto the American Trading Company, a corporation organized under the laws of the State of Connecticut, in the sum of forty-five thousand dollars ($45,000), to be paid to the said American Trading Company, its successors and assigns, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 2d day of April, 1903.

93 Whereas, the Northern Pacific Railway Company has appealed to the Supreme Court of the United States from a final decree entered in the office of the clerk of the circuit court of appeals of the United States in and for the second circuit on the 26th day of January, 1903, directing the payment to the American Trading Company of twenty-six thousand seven hundred and four dollars and 2/100 with interest from the 4th day of January, 1895, and costs, by the Northern Pacific Railway Company in the suit wherein The Farmers' Loan and Trust Company is complainant and The Northern Pacific Railroad Company and others are defendants.

Now, therefore, the condition of this obligation is such that if the above-named The Northern Pacific Railway Company shall prosecute its said appeal to effect and answer all damages and costs if it

shall fail to make its plea good, then this obligation to be void otherwise to remain in full force and virtue.

[SEAL.] THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN, *Manager.*

Attest: G. TERRY SINCLAIR,
*Attorney in Fact.*

THE NORTHERN PACIFIC RAILWAY COMPANY,
[SEAL.] By DANIEL S. LAMONT, *Vice President.*

Attest: GEO. H. EARL, *Secretary.*

94 *Affidavit, Acknowledgement, and Justification by the United States Fidelity and Guaranty Company.*

We will bond you.

Contract. Fidelity. Judicial. Burglary.

STATE OF NEW YORK, } *ss:*
*County of New York,* }

Before me personally came Sylvester J. O'Sullivan, known to me to be the manager, of the United States Fidelity & Guaranty Company, the corporation described in and which executed the annexed bond of the Northern Pacific Railway Company as surety thereon, who being by me duly sworn, deposes and says that he resides in the city of New York, State of New York, and that he is the manager of said The United States Fidelity and Guaranty Company and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of the Northern Pacific Railway Company is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as manager of said company; and that he is acquainted with G. Terry Sinclair, and knows him to be the attorney in fact of said company; and that the signature of said G. Terry Sinclair, subscribed to said bond is in the genuine handwriting of said G. Terry Sinclair, and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unincumbered and liable to execution, exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of one million dollars ($1,000,000.00).

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 2nd day of April, 1903.

JAMES P. WRIGHT,
*Notary Public, New York County.*

95 STATE OF NEW YORK, } ss:
*County of New York,* }

On this 3rd day of April, 1903, before me personally came Daniel S. Lamont, to me known, who being by me duly sworn, did depose and say that he is the vice-president of the Northern Pacific Railway Company, the corporation described in and which executed the foregoing instrument, that he knew the seal of said corporation, that the seal affixed to such instrument was such corporate seal, that it was so affixed by order of the board of directors of said corporation, and he signed his name thereto by like order.

HENRY W. CLARK,
*Notary Public, New York County, N. Y.*

96 [Endorsed:] United States circuit court of appeals, second circuit. The Farmers' Loan and Trust Company against The Northern Pacific Railroad Company, *et al.* Intervention of the American Trading Company. Supersedeas bond. Approved as to form and also as to sufficiency of sureties with reservation, however, to the appellee of the right at any time to examine the proper officers of the surety company under oath, touching their assets, liabilities and financial condition generally. Wm. J. Wallace, U. S. circuit judge. United States circuit court of appeals, second circuit. Filed Apr. 6, 1903. William Parkin, clerk. Sullivan & Cromwell, solicitors for appellant, 49 Wall street, New York city, N. Y.

97 UNITED STATES OF AMERICA, } ss:
*Southern District of New York,* }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 96 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Farmer's Loan & Trust Co. *against* Northern Pacific R. R. Co., American Trading Co. intervenor, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 7th day of April in the year of our Lord one thousand nine hundred and three and of the Independence of the said United States the one hundred and twenty-seventh.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

98 UNITED STATES OF AMERICA, *ss:*

To the American Trading Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden in the city of Washington, thirty days from the date hereof, pursuant to an appeal filed in the clerk's office of the circuit court of appeals, second circuit, wherein The Northern Pacific Railway Company is appellant, and you are appellee, to show cause, if any there be, why the decree entered in the clerk's office of said circuit court of appeals, second circuit, on the 26th day of January, 1903, in the cause entitled "The Farmers' Loan & Trust Company, complainant, against The Northern Pacific Railroad Company, *et al.*, defendants, intervention of the American Trading Company" should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, on this 6th day of April, in the year of our Lord, one thousand nine hundred and three.

WM. J. WALLACE,
*Judge of the Circuit Court of Appeals of the United States for the Second Circuit.*

99 (Endorsed:) United States Supreme Court. The Farmers' Loan and Trust Company, *vs.* The Northern Pacific Railroad Company, *et al.* Intervention of the American Trading Company. Citation. Sullivan & Cromwell, solicitors for Northern Pacific R'y Company, 49 Wall street, New York. United States circuit court of appeals, second circuit. Filed Apr. 6, 1903. William Parkin, clerk.

Endorsed on cover: File No. 18,893. U. S. C. C. of appeals, 2nd circuit. Term No. 665. The Northern Pacific Railway Company, appellant, *vs.* The American Trading Company. Filed April 15th, 1903.

BRIEF FOR APPELLANT.

C. W. Burns,
For Appellant.

# Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 24.

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THE NORTHERN PACIFIC RAILWAY COMPANY,
Appellant,

vs.

THE AMERICAN TRADING COMPANY.

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## *BRIEF FOR APPELLANT.*

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STATEMENT.

By the decree in a foreclosure suit, in the Circuit Court of the United States for the Southern District of New York, against the Northern Pacific

*Railroad* Company, the Northern Pacific *Railway* Company, the purchaser of the mortgaged property, was required to pay all obligations or liabilities contracted or incurred by the Court's Receivers. The American Trading Company intervened in that suit and asks, by virtue of the said decree, that the Northern Pacific Railway Company be required to pay damages for the failure of the Receivers to perform a contract for the transportation of goods.

The case was tried upon an agreed statement of facts (Transcript, p. 14) by which it appears:

The Receivers under the order of the court were authorized to continue and were continuing the business of the Northern Pacific Railroad Company, *i. e.*, of the company chartered by the act of Congress of July 2, 1864. Their railroad extended from Duluth, Minnesota, to Tacoma, Washington. They had contracts with various carriers for through billing to and from points not on their line. One of such carriers was the Northern Pacific Steamship Company, which was an English company operating a line of steamers between Tacoma and points in Japan and China, including Yokohama. The contract between the Steamship Company and the Receivers was one originally made between the Steamship Company and the Railroad Company and by leave of court adopted by the Receivers; a copy is annexed to the statement of facts Exhibit A, p. 23, Transcript. The Receivers held no stock in the Steamship Company and there is no proof of any relations between them

and it, other than such as appear by the contract (Transcript, p. 14).

By this agreement the Receivers and their agents in the United States were made agents of the Steamship Company for the purpose of making through rates and issuing through bills of lading TO Asiatic ports (Transcript, p. 26), and the Steamship Company and its agents were similarly agents of the Receivers in Asia as to shipments FROM its ports (Transcript, p. 25).

The Receivers had an office in the city of New York in charge of George R. Fitch, called "General Eastern Agent," and he made arrangements for the transportation of freight upon the Receivers' railroad and its connections, including transportation to China and Japan. Fitch's only authority to act as agent of the Steamship Company was that arising under the contract, Exhibit "A." He never received any direct or independent appointment from the Steamship Company. He knew that an arrangement had been concluded between the Receivers and the Steamship Company, by which contracts for through shipment to Yokohama might be made and through bills of lading issued by the Receivers' agents, and he had been instructed by the Receivers to solicit freight for through transportation upon bills of lading of which Exhibit "C" (opposite p. 29, Transcript) is a copy. Fitch did not know the terms of the contract between the Steamship Company and Receivers, and the Trading Company did not know what corporation operated the steamships, or that the Steamship Com-

pany was separate and independent, or that there was any contract between the Receivers and that company (Transcript, p. 15).

Fitch had no express authority to make any contract for through transportation, except the contract stated in the bills of lading. The Trading Company did not know the terms of his express authority (Transcript, p. 15).

The Trading Company is a corporation organized under the laws of Connecticut, having its principal office in the city of New York, and was engaged in carrying on a general commercial business with Asiatic ports (Transcript, p. 15).

In September, 1894, it applied to Fitch for a rate upon a proposed shipment of about two hundred tons of pig lead from New York to Yokohama, informing Fitch that it was of vital importance that the lead should go forward by the earliest steamer, in order to enable the Trading Company to fulfil a proposed sale of the lead in Japan. Fitch thereupon named a rate and undertook to forward the lead from New York on or before September 29th and from Tacoma via the Northern Pacific steamer "Tacoma," sailing October 30 (Transcript, p. 15).

Thereupon the Trading Company cabled its agents at Yokohama naming a price and date at which the lead could be delivered there, and its agents made a sale, voidable at the option of the purchaser in case of extraordinary delay. Neither the Receivers nor Fitch knew until September 24 that any such contract had been made and they never had any information of its particular terms.

Upon concluding the contract of re-sale in Japan, the Trading Company bought two hundred tons of lead of the Balbeck Smelting and Refining Company of Newark, New Jersey (Transcript, p. 16).

On September 19 Fitch wrote to claimant, quoting a rate for the lead "to be forwarded from New York on or before Sept. 29th in accordance with shipping instructions given you by me, and to be forwarded from Tacoma, Wash., *via* Northern Pacific steamer, sailing from thence October 30th." This was accepted by claimant's letter of September 20 (Transcript, p. 16). On September 22 Fitch wrote giving routing (Transcript, p. 17).

War between Japan and China then existing, Fitch, before naming a rate, expressed doubt as to whether lead might not be excluded from transportation as contraband. Shipment of lead was not prohibited by the United States during this war, and on September 25 claimant made a shipment via San Francisco, which went through without delay. Various telegrams between Fitch and the Receivers' general offices at St. Paul relating to the making of the rate are inserted in the statement of facts, one of which dated September 22 stated, that the steamship company declined to handle lead, and directed Fitch to cancel his quotation. Fitch accordingly did so, and on September 24 claimant wrote him threatening to hold "your company" responsible for any damage. Thereupon further telegrams passed, and the refusal to accept the shipment was withdrawn (Transcript, pp. 18-19).

The lead was shipped September 27 at Newark by the Anchor line to Duluth, received at Duluth by the Receivers' railroad and transported in due time to Tacoma.

On September 28, a shipping receipt or bill of lading was issued by the Anchor Line, Newark to Duluth (Exhibit B, Transcript, p. 28), and was forthwith surrendered by claimant to Fitch, who issued in place of it a bill of lading in the usual form, Newark to Yokohama, a copy of which is annexed to the statement of facts (Exhibit "C," Transcript, p. 29). No objection was made to its terms by claimant and none of its officers or clerks examined its terms. Claimant immediately hypothecated it with the Hong Kong and Shanghai Bank as collateral security for money borrowed (Transcript, pp. 20-21).

On September 28 a check for the freight from *Newark to Yokohama* was given by claimant to Fitch and deposited by him to his account as agent. This was the first shipment which claimant had ever made on the line of the Northern Pacific and connecting carriers (Transcript, pp. 19-20).

In prominent type in the heading of the bill of lading was the following:

"THE NORTHERN PACIFIC RAILROAD CO.
IN CONNECTION WITH
THE NORTHERN PACIFIC STEAMSHIP CO."

By its terms the freight was receipted for by the Railroad Company "to be carried to the port of Tacoma, Wash., and thence by NORTHERN PA-

CIFIC STEAMSHIP COMPANY'S STEAMER 'Tacoma' to the port of Yokohama."

The contract states separate terms for the transportation on the land and on the sea. In the conditions respecting service on land it is stated (subdivision 3 of conditions):

> "No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee."

(Subdivision 12 of conditions):

> "This contract is executed and accomplished and all liability hereunder terminates, on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien, due and payable by the steamship company."

The bill of lading was subscribed in the following form:

> "IN WITNESS WHEREOF, The Agent signing on behalf of the said THE NORTHERN PACIFIC RAILROAD COMPANY, and of the said NORTHERN PACIFIC STEAMSHIP COMPANY, severally, and not jointly, hath affirmed to three Bills of Lading all of this tenor and date, one of which Bills being accomplished, the others to stand void.
>
> Dated at New York this 28th day of September, 1894.
>
> GEO. R. FITCH,
> G. E. Agent on behalf of carriers severally but not jointly."

On September 29, Fitch wrote the agents of the Steamship Company a letter inclosing a copy of the bill of lading, and stating that he had guaranteed delivery by steamer sailing October 30. Of this letter claimant had no knowledge.

At Tacoma the lead was delivered by the Receivers to the Steamship Company and loaded upon the "Tacoma," which was due to sail October 30; but at about 4 P. M. of that day the Deputy Collector of the United States at Tacoma refused to clear the vessel while the lead was on board, on the ground that it was contraband of war, and telegraphed the Collector at Port Townsend for instructions. On the day following the Collector answered as follows:

> "Department advises that unless you have evidence tending to show that the pig lead now at Tacoma and referred to in your telegram of yesterday is to be used in the war between China and Japan, no reason is perceived why shipment should not be permitted."

In the meantime the master of the vessel had unloaded the lead, which delayed the ship until 9 A. M. the morning of October 31, when he sailed without it.

The Trading Company was not notified of this until November 5 (Transcript, p. 22).

The next vessel in the line was the "Sikh," a chartered ship not belonging to the Steamship Company. Her captain declined to take the lead on the ground that it was contraband, and the owners of the ship in London, being cabled to by the

Steamship Company, adhered to the captain's position (Transcript, p. 22).

The lead went forward on the next vessel, the "Victoria," December 11, and arrived in Yokohama January 4, 1895, instead of on or about November 18, 1894, when it would have arrived had it gone forward October 30 (Transcript, p. 22).

In the meantime hostilities between China and Japan had ceased, the price of lead had fallen and the purchaser refused to carry out his contract in consequence of the delayed delivery. The price at which he bought was $38,610.17, and the Trading Company resold for $11,331.60, the best price then obtainable. The difference, $26,704.02, with interest, is claimed as damages in this proceeding (Transcript, p. 22).

The case was decided in the Circuit Court by Judge Wheeler, who dismissed the petition, holding that the delay was due to the act of a government officer, over which the carrier had no control (Transcript, p. 29-31).

This decision was reversed by the Circuit Court of Appeals and damages awarded against the Railway Company. The opinion of the court will be found at p. 40-46 Transcript.

This court has jurisdiction of the appeal. This was an intervention in a foreclosure suit, in which suit the jurisdiction by the Circuit Court rested on a federal question (Transcript, p. 2); *Union Pacific Ry. Co. v. Harris*, 158 U. S. 326; *Northern Pacific R. R. Co v. Amato*, 144 U. S. 465. The jurisdiction over interventions is referable to the jurisdiction

of the main suit; *Pope v. Louisville, New Albany & Chicago Ry. Co.*, 173 U. S. 573, and cases cited. Therefore the judgment in the intervention proceeding is appealable to this court, as the judgment in the main suit would have been.

## Assignments of Error.

Errors are duly assigned in the record (Transcript, pp. 48-9).

The following propositions are included in the assignments of error and will be urged:

1. *The record does not show any agreement that the Receivers would assume responsibility for the transportation beyond the line of railway in their charge.*

2. *There is no proof that the court had authorized the Receivers to assume such responsibility, and they could not do so without such authority.*

3. *If Fitch made such an agreement it was not within his authority, real or apparent.*

4. *The bill of lading is the controlling contract, and by its terms the Receivers were not liable beyond their own line.*

5. *The damages were caused solely by the act of the Collector, representing the authority of the United States, and the Receivers are not liable for damages so caused.*

## ARGUMENT.

### I.

Inasmuch as the damages sued for were due solely to delay after the goods had been delivered by the Receivers to the connecting carrier, the first question confronting us is, whether the Receivers were responsible for such damage. In order to establish their reponsibility, it must appear (a) that Fitch made in fact an agreement that the Receivers should be responsible for the whole transportation from Newark to Yokohama; (b) that such agreement was within the scope of his authority, and (c) that the Receivers themselves could lawfully make such a contract.

Therefore the first and one of the most important questions in the case is, whether the testimony proves that Fitch in fact made a contract that the

Receivers should be responsible for the whole distance. This question received very scant consideration by the learned Circuit Court of Appeals (Transcript, p. 43-4).

Mr. Justice Field, delivering the unanimous opinion of this court in *Myrick v. Michigan Central R. R. Co.*, 107 U. S. 102, lays down the rule which must be applied to the testimony in this case:

> "The general doctrine, then, as to transportation by connecting lines, approved by this court, and also by a majority of the state courts, amounts to this: That each road, confining itself to its common law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and *the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence.*"

The same doctrine is illustrated and applied in the well considered cases of *Taylor v. Maine Central Railroad*, 87 Me. 302; *Burroughs v. Norwich & Worcester Railroad*, 100 Mass. 26, Gray, J.; *Washburn & Moen Mfg. Co. v. Providence & Worcester R. R. Co.*, 113 Mass. 490.

The claimant seeks to establish an agreement which is unusual, and this he must show by "clear and satisfactory evidence," and no "doubtful expressions or loose language" will suffice. Was there any clear, special contract that the *Receivers* should carry beyond Tacoma or that *they* should

carry or guarantee the carriage by any special boat?

In determining this question it is not necessary to consider any verbal communications between the claimant and Fitch, and our attention may be confined to the Fitch letter of Sept. 19, 1894 (Transcript, p. 16). This unquestionably supersedes any previous oral communications, and such must be the view of the claimant, because in its letter dated September 24 (Transcript, p. 18) it advised Fitch, after he had proposed to decline taking the shipment as contraband, that it would hold the company under "your contract with us under date Sept. 19th, and confirmed by us under date Sept. 20th."

Considering that this sort of a contract cannot be made out by inference, or "from doubtful expressions or loose language," and that it must appear from "clear and satisfactory evidence," the letter of Fitch is very far from showing any agreement on the part of the Receivers with respect to transportation beyond Tacoma. Fitch confirms a rate and specifies how and when the property shall go through. He says, "to be forwarded from New York on or before Sept. 29th, in accordance with shipping instructions given you by me and to be forwarded from Tacoma, Wash., *via* Northern Pacific steamer sailing from thence October 30th." There is no guaranty nor promise in terms that the Receivers should do anything beyond their own line. He no doubt agreed that the Receivers should perform their part of the transportation, that is get the shipment to Tacoma in time for the steamer

mentioned; but that the Receivers guaranteed performance by other carriers, or that they assumed responsibility for a connecting carrier taking the goods on a particular steamer, is a proposition, which cannot be made to appear clear and beyond controversy from the language of the letter. The letter is no more a special contract that the Receivers would carry beyond their line than were the receipts issued by the carriers in some of the cases above cited.

And the rule of the Myrick decisions should in the case of receivers be most strictly adhered to. Especially should the court hesitate to find upon such evidence as this letter, that the receivers of a court agreed to carry beyond the line being administered by the court.

Claimant relies upon the fact that it informed Fitch of the necessity that the load should go forward at the date indicated. But this proves nothing. For the sake of the argument it might even be conceded that he agreed for the Stewardship Company that the freight should be carried by a certain steamer. But claimant must show, not only a special agreement made by Fitch to carry by a particular boat to Yokohama, but that he agreed this for and on behalf of the Receivers, and undertook that they should be responsible for that part of the transportation to be performed by connecting carriers.

Claimant calls special attention to the letter of Fitch dated Sept. 29 (Transcript, p. 21) in which he says: "I have made contract guaranteeing deliv-

ery of this shipment at Yokohama by our S. S. "Tacoma sailing October 30th;" but suppose he had so contracted, the question is, for whom? The letter in which this statement was made was written to the Steamship Company. He was in fact acting for two principals. Like the agent in *Washburn & Moen Mfg. Co. v. Providence & Worcester Ry.*, *supra*; and the plaintiff must establish that he made the alleged guaranty on behalf of the Receivers.

The claimant should have known that Fitch was acting for several principals, and must be held, so think, to have known it. It is a corporation having a principal office in New York and carries on a general commercial business with foreign ports (Testimony, p. 15). The shipment in question was a very large one, and about the same time claimant made a similar shipment to Japan via San Francisco (Testimony, p. 17). Being a corporation engaged in general trade to foreign ports does not suggest that its officers are ignorant of the routes of the customs of shipping; and that its officers have there were more carriers than the Receivers is evident at the outset. For claimant started the shipment by the Pennsylvania Railway and the Ocean line, which carried it from Newark to Duluth a thousand miles before it reached the Receivers' railway; the claimant obtained a receipt of the Ocean line (Exhibit "B") and forthwith surrendered it to Fitch for the bill of lading (Exhibit "C").

The claimant therefore knew that other carriers than the Receivers were concerned in Fitch's con-

*Washburn & Moen Mfg. Co. v. Providence & Worcester Ry., supra*). It knew the essential fact that Fitch was a general agent of more than one carrier, for it shipped by the Pennsylvania and Anchor line and paid the freight for that shipment to Fitch. Suppose the loss had occurred on the Pennsylvania railway or on the Lakes, could the claimant have held the Receivers? We think not, for the case would come precisely within the decided cases before cited.

As the claimant knew *some* other carriers were represented by Fitch, they should have inquired, if interested, what others. And as shippers of experience in the Asiatic trade, they were bound to know that no one railway company formed by its own line alone a through route from United States shipping points to Asia. The corporate name Railway Company *prima facie* negatives the idea that such a corporation owns and operates a ship line across the Pacific. The act of Congress incorporating the Northern Pacific Railroad Company gave that company no such authority, and it is to say the least doubtful if it could have exercised it. The claimant does not assert that it supposed or believed the Receivers owned or operated the ship line, or that any such appearance or inducement was held out to them. The record shows that it knew nothing on the subject and did not inquire (Transcript, p. 15).

## II.

The only proof of the authority of the Receivers is, that they were authorized by the court to continue and were continuing to carry on the business of the railroad in their charge (Transcript, p. 14). There is no proof that the court had authorized them to transport goods beyond their own line, or guarantee the transportation thereof by other carriers, and in the absence of such authorization we submit that such contracts were beyond their power.

The general rule as to the power of receivers is stated by this court in the opinion delivered by Mr. Justice Jackson in *Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554:

> "It is undoubtedly true that a receiver, without the previous sanction of the court, manifested by special orders, may incur ordinary expenses or liability for supplies, material or labor needed in the daily administration of railroad property committed to his care as an officer of the court; but it seems equally well settled that the courts decline to sanction the exercise of this discretion on the part of receivers in respect to large outlays, or con-

> tracts extending beyond the receivership, and intended to be binding upon the trust. The receiver being an officer of the court, and acting under the court's direction and instructions, his powers are derived from and defined by the court under which he acts. He is not such a general agent as to have any implied power, and his authority to make expenditures and incur liabilities—like the one in question—must be either found in the order of his appointment, or be approved by the court, before they acquire validity, and have any binding force upon the trust."

The ordinary and usual business of the railroad company the Receivers had the right to do, but it appears from *Myrick v. Michigan R. R. Co.*, *supra*, that contracting for transportation beyond its own line is an unusual and extraordinary service, not, according to American law, pertaining or belonging to the duties of a common carrier, but requiring a special and express contract. Therefore the making of such guaranties is no part of the necessary, or even the usual, business of operating a railroad, and does not come under the authority of Receivers as defined in the McNulta case. *International & Great Northern R. R. Co. v. Wentworth*, 87 Texas, 311.

There can, we submit, be no more ground for saying that the Receivers could lawfully guarantee the performance of service by the ocean carrier between Tacoma and Yokohama,than for holding that the Receivers themselves could buy or charter ships and by their operation transport the freight themselves, or that they could guarantee the earnings of ships operated by others. And will it be con-

tended for a moment that the Receivers, under the ordinary power to operate this railroad, could have set up a steamship line across the Pacific ocean and subjected the trust fund in their charge to the risks and liabilities of such an enterprise, or that they could have guaranteed earnings to the Steamship Company? See *Green Bay & Minnesota Railroad v. Union Steamboat Co.*, 107 U. S. 98; *Railway Companies v. Keokuk Bridge Co.*, 131 U. S. 371, 385; *Swift v. Pac. Mail Steamship Co.*, 106 N. Y. 206, 216-17.

## III.

However Fitch acted, and whatever the ideas of himself or claimant upon the subject, if he did make any engagement on behalf of the Receivers for carriage of the goods beyond Tacoma, he exceeded his authority.

It is admitted that he had no special authority to make such a contract. It is also admitted that he had no express general authority to make contracts for through transportation except as pro-

vided by the bills of lading (Transcript, p. 15). The bill of lading (Exhibit "C") is signed by him for the carriers severally and not jointly, and contains the provision that

> "No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route" (paragraph 3 of Conditions),

and that all responsibility of the carrier to Tacoma ends on delivery to the vessel there (paragraph 12 id.).

Therefore, Fitch had actually no power to make the Receivers liable except upon their own line.

If, then, the Receivers are to be held bound by his agreement rendering them liable for damages resulting from matters not occurring on their line, it must be because they invested their agent with an apparent authority in excess of his real authority. Nothing of the sort appears here.

The only circumstances which could possibly be pointed to as authorizing a belief that Fitch had authority to bind the Receivers by a guaranty of the conduct of their connecting carriers are, that he was their General Eastern Agent, that he wrote upon letter paper bearing a heading which announced only that he was *their* agent, and that he signed his name with the addition "G. E. A."

As to the first of these circumstances, it does not appear at all what are the usual powers of a General Eastern Agent of a western carrier, or even whether there can be said to be any such usual powers. It does appear from the telegrams which passed between him and the superior employes of

the Receivers (Transcript, pp. 17-19) that his authority was, in fact, very limited, and that he could not even name a rate to Asia without special authorization. Not a circumstance appears to justify a belief on the part of claimant that his authority was anything more than it actually was. Claimant's officers may have believed so, but they had no right to believe so from the mere fact that he was called "General Eastern Agent" of the Receivers.

It is familiar law, that one who deals with an agent is bound to inquire as to the extent of his authority, and acts at his peril if he does not inquire. This case is a particularly strong illustration of the propriety of this rule. Had claimant inquired, it would have appeared, that Fitch neither supposed himself authorized to bind the Receivers as to any transportation beyond their lines, nor had any idea of doing so. The bill of lading which he subsequently issued plainly shows this. Fitch certainly did not suppose that in issuing this bill of lading he was departing from his original agreement. His correspondence with the Steamship Company's agents (Transcript, p. 21) shows, that they and he considered he was acting as agent for that company for the carriage beyond Tacoma. All this claimant would have discovered had it made the slightest inquiry.

Nothing was done either by Fitch or by the Receivers to indicate that his authority was at all greater than it really was. He appeared to be the General Eastern Agent of the Receivers, and

he was. He appeared to be authorized to represent them to some extent in arranging for shipments over their railroad, and he was so. What his powers were in no way appeared, nor had anybody any right to infer from what appeared that he had broad powers. He had no power to make an undertaking *for the Receivers* to carry over any line except the railway in their hands, and he did not appear to have any.

It is a practice so common that we submit the court must take notice of it, for an agent, primarily appointed by one of several connecting carriers, to make agreements for the through carriage of freight, acting as agent for each carrier for its own part of the route. That he is called agent of one company or carrier, or of another, neither means, nor indicates that that particular carrier assumes responsibility for the entire transportation. Indeed, this is held in the cases which adhere to the rule of *Myrick v. Michigan Central R. R.*, and is one of the fundamentals of the American law as distinguished from the English. In this is solid ground for holding any large shipper of wide experience bound to apprehend that Fitch would represent several principals in a contract for transportation from Newark to Yokohama.

The learned court below cited and applied to this case decisions upon the apparent authority of a "General Freight Agent." But he is frequently and commonly the head of the freight department. And the assumption that the apparent authority of the "General Eastern Agent" of a western railroad has apparent powers co-extensive with those of a "General Freight Agent" is unwarranted by anything before the court.

## IV.

It appears that the goods were shipped from Newark on the 27th of September, and the Balbeck Smelting & Refining Company (the shippers) received at Newark from the Anchor line the receipt or bill of lading marked Exhibit "B." This instrument states that the goods were received on the 28th. The Balbeck Company delivered it to the Trading Company, which *forthwith* surrendered it to Fitch, who on Sept. 28 (the same day), issued a bill of lading in the *usual form* (Transcript, p. 20). This bill of lading was not read by the officers of the Trading Company, but was immediately negotiated to the Hong Kong and Shanghai Bank for money borrowed. It is evident that the Trading Company throughout the whole negotiation expected to receive a bill of lading from Fitch, upon which they could borrow money. It is also evident that the bill of lading was issued as soon as practicable after the goods were delivered and that it *could* not

have been issued earlier. Upon these facts we insist that the bill of lading expresses the only contract covering the rights of the parties; and that the plain agreement of the bill of lading, that the Receivers should not be liable beyond their terminus at Tacoma, is a part of that contract; *Seitz v. Brewers Refrigerator Co.*, 141 U. S. 510; *De Witt v. Berry*, 134 U. S. 306.

The learned Circuit Court of Appeals as to this point held that the bill of lading did not control, because the goods were shipped before its issue, relying on *Missouri Pacific Railway Co. v. Beeson*, 30 Kansas, 298; *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318; *Gaines v. Union Trans. & Ins. Co.*, 28 Ohio St. 418; *Bostwick v. B. & O. R. R. Co.*, 45 N. Y. 712.

In *Missouri Pacific Railway Co. v Beeson*, the proof was of a shipment for transportation without limitation of liability, where after the goods had left the shipper signed a paper, claimed to limit the liability, which he could not well read and did not read, but which he supposed to be a receipt.

In *Swift v. Pacific Mail Steamship Co.*, the shipper did not apply for a bill of lading, but it was mailed to him two months after the shipment and not received until after the goods were on the ocean and the damage had occurred. The court held (106 N. Y., p. 219):

> "The defendants could not, therefore, abrogate or alter that contract by merely signing

> and mailing bills of lading, which did not reach the plaintiffs until after the oil had left Aspinwall, and much, if not all, the loss had occurred. There certainly was no conclusive evidence that the plaintiffs consented to accept the bills of lading in place of the prior contract, and that contract must, therefore, control."

In *Bostwick v. Baltimore & Ohio Railroad Co.*, the preliminary agreement was that the goods should be shipped to New York all rail, and a higher rate of freight was paid for that agreement. The goods were in fact shipped partly by water. The court said (p. 716):

> "If the plaintiff had expressly assented to the terms of the bill of lading subsequently delivered to him, such assent would operate as a change of the terms of the contract originally made and under which he had parted with his property. But after the verbal agreement had been consummated and rights had accrued under it, the mere receipt of the bill of lading, inadvertently omitting to examine the printed conditions, was not sufficient to conclude the plaintiff from showing what the actual agreement was under which the goods had been shipped."

The case of *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318, does not bear upon the subject. The point decided was that a carrier could not limit his common law liability by an unsigned general notice on the back of a receipt.

In the case of *Gaines v. Union Trans. & Ins. Co.*, the point involved was the right of a carrier to limit its common law liability by a bill of lading handed to the shipper and not examined.

In *Shelton v. Merchants Despatch Trans. Co.*, 59 N. Y. 258, it was held that a bill of lading was binding although issued after the shipment, when it was issued in accordance with the habitual mode of doing business between the shipper and the carrier.

In *Hill v. Syracuse, Binghamton & N. Y. R. R. Co.*, 73 N. Y.351, the court holds what is very obviously a sound proposition, that the delivery of the property and of the bill of lading are generally regarded as simultaneous acts, although usually the delivery of the property necessarily precedes the making out and issuance of the bill of lading, and in most cases some parol negotiations precede the delivery of the property. Same rule decided in *Germania Fire Ins. Co. v. Memphis & Charleston R. R. Co.*, 72 N. Y. 90.

In *Rubens v. Ludgate Hill Steamship Company*, 20 N. Y. Supp. 481, where the bill of lading was not issued until after shipment, the court said:

> "We think it equally well established that, though in this case there was no evidence that the bill of lading was delivered to plaintiffs or to their duly constituted agent at the time of the shipment of the goods at Antwerp, still the forwarding of the bills of lading to the bankers, the indorsement thereof over to plaintiffs, and their entry thereon of the goods at the custom house, were an unequivocal ratification of the terms and conditions of a contract entered into on their behalf, the terms of which, in the absence of any evidence to show that they dissented or demurred thereto, they must be held to have assented to and accepted."

In applying the authorities to the facts in this case, it is material to consider:

1. It is not a case where a bill of lading was imposed upon an ignorant or unskilful man, which is an element in some of the decisions.

2. Although in this case there was no custom of business between the shipper and the carrier, because there had been no prior shipments, the shipper did throughout the negotiations expect and understand that he was to receive a bill of lading.

3. The bill was issued upon the shipper's application as soon as possible—as the record states, "forthwith" after the shipment—and should fairly be regarded as simultaneous with it.

4. It expressed the *usual* carrier's liability, and was in no sense an attempt to limit or lessen that liability.

5. The Trading Company assented to its terms by immediately negotiating it to the bank.

The learned Circuit Court of Appeals treated the case as if it were necessary for the carrier to show that the shipper was *estopped*, by some positive and affirmative act relied on by the carrier, to dispute the bill of lading. This is not, we submit, a correct view. The most the carrier must be held to establish in order to make the bill of lading a binding contract, is that the shipper *assented* to it. *See cases supra.*

How could he show a more unequivocal and complete assent than to prove: first, the shipper understood throughout the negotiations that a bill of lading was to be issued; second, applied for it as soon as possible after delivery of the goods; third, accepted a bill expressing the ordinary common law liability of the carrier; fourth, negotiated it at once for his benefit?

It is important that we do not in this case seek to limit by the bill of lading the common law or usual liability of the carrier, but only to show that the parties in this case made the very contract, which this court has held to conform to the ordinary and usual carrier's liability; it is stipulated in the record that the bill of lading was in the *usual* form.

It is important, too, that the shipper *requested* throughout the negotiations to secure the bill of lading. It was essential to him. He negotiated for IT. How then can it be said not to merge everything prior? How can it be held an unaccepted paper foisted upon the shipper?

We know of no authority which, upon facts similar to those in this case, applies the rule held by the court below. No decision can, we believe, be pointed out where a shipper has asked for a bill of lading in order to negotiate it, and has then negotiated it, and it has been held not a part of the contract.

The receipt for negotiation and the immediate negotiation of the bill of lading so insist constitute an *assent* to its terms, within the language

of the cases. It cannot be otherwise regarded, because the shipper secured and transferred to the bank an important right, which according to the shipper's own claim, it did not have under the preliminary negotiations, viz: the right to hold the Northern Pacific Steamship Company responsible for the transportation from Tacoma to Yokohama. The shipper placed itself and its credit in contract relations with the Northern Pacific Steamship Company. It and its vendee were in position to enforce those rights against that company. Suppose the goods had been lost at sea, the shipper and the bank would have had a right to sue the Steamship Company upon the bill of lading, and had the Receivers been insolvent can it be doubted that they would have exercised that right? So they would have certainly been required that right to sue and had the Receivers been insolvent or could the Steamship Company not have been successfully sued and had the Receivers

## V.

The Collector's action in refusing to allow the boat to carry the lead, made the performance of the agreement not only impossible, *but unlawful*, and therefore absolved the carriers from the agreement to carry by that boat.

That the lead did not go by the steamer sailing October 30, was due to no fault of any carrier. The Anchor line, the initial carrier, transported it in due time to Duluth and delivered it to the Receivers; the Receivers carried it in due season to Tacoma and delivered it to the Steamship Company; and the Steamship Company loaded it aboard its vessel sailing October 30. The Deputy Collector, an officer of the United States having authority, refused to allow the ship to sail with the lead. He refused her a clearance and compelled the discharge of objectionable freight before he would issue one. The non-liability is placed upon the *illegality* of carrying out the contract, no matter what it was, or by whom made, and regardless of any provision of the bill of lading.

Probably the Deputy Collector erred. Contraband as the lead doubtless was, trade therein was

lawful. *Kent's Commentaries*, 14th ed. *142-143 and notes (c) and 1. *The Santissima Trinidad*, 7 Wheat. 283, 340; *Richardson v. Maine Ins. Co.*, 6 Mass. 102, 113; 11 *Opinions of Attorney General*, 408; *The Helen*, L. R. 1 Ad. & Ec. 1.

We apprehend that neither the Deputy Collector, nor the Collector, nor the Secretary would have done right to prevent this shipment, or detain the vessel on account thereof. But rightly or wrongly, the United States officers charged with authority did withhold the clearance, and for the ship to sail without clearance would have been an offense against the laws of the United States. R. S. 4197.

This brings the facts within the rule in the leading case of *Brewster v. Kitchell*, 1 Salk. 198, that "if H. covenants to do a thing which is lawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed."

It is true that in the case at bar no new statute has intervened, but by the act of the Deputy Collector the sailing of the vessel with the lead became unlawful. By virtue of the statute of the United States, the Deputy Collector was able to, and did, make it unlawful to sail with the lead, and that it was so unlawful, however that came about, is a perfect excuse for not doing it. *Baily v. De Crespigny*, L. R., 4 Q. B. 180.

See *Leake on Contracts*, 710-713.

It is indeed true that a party may bind himself to do an act in such a way that a subsequent arising impossibility is no defence, but that is not this case. The rule upon that subject is laid down in *Chicago, Milwaukee & St. Paul Ry. Co. v Hoyt*, 149 U. S. 1. There Mr. Justice Jackson, for the court, said:

> "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

Applying here the rule of that opinion, it is perfectly clear that the obstruction arising from the act of an officer of the government was in nobody's contemplation. It appears that there was no prohibition by the Department during the war in question of the carriage of such goods, and claimant shipped lead from San Francisco to Yokohama at about the same time. It is evident that no one should have entertained any apprehension upon this point. Whatever doubts Fitch may have had appear from his correspondence to have referred to

whether his principal, the Steamship Company, would subject their ship to the risk of capture by Chinese cruisers. There is no probability that either party had in mind the United States Collector refusing to allow the ship to sail with the lead.

The cases cited for the claimant do not meet the point here involved. They are cases which simply lay down the general rule stated above. They do not come within the exception which the supreme court states in the passage quoted, *nor are they cases where performance became illegal*, and therefore do not apply here.

The argument for the claimant takes no account of the *nature* of the obstacle which caused the impossibility in this case, although that is the point of capital importance. Where an act which a party has agreed to do becomes *unlawful* he is released from his obligation, and this rule is fully recognized in the cases cited for appellee.

Thus, *Blight v. Page*, is reported only in a note to *Touteng v. Hubbard*, 3 B. & P., 291; in the latter case Lord Alvanley, C. J., for the court, while approving *Bright v. Page*, states the rule as follows:

> "*Where the policy of the state intervenes and prevents the performance of the contract, the party will be excused;* and so if a party who has covenanted not to do something is directed by act of Parliament to do that very thing, he is released from his covenant."

In *Barker v. Hodgson*, 3 M. & S. 270, the court said, just before the passage relied on by appellee:

> *"If, indeed, the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been dissolved* on both sides, and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages."

The principle of the cases is that, it being the duty of the courts to enforce the laws of their country, they will never hold a party liable in damages because he has not violated them. While acts and laws of foreign governments are treated in the same way as natural occurrences, a breach of contract caused by obedience to lawful authority of the government under which the court sits, and which authority the defendant is bound to obey, will never give a right to damages. Any injury arising from the interference of government gives rise to no right of action.

This was the rule followed by the learned judge in the Circuit Court, and it is this that makes the *case of N. Y. N. H. & H. R. R. Co. v. Baker*, cited by him, in point. That decision was based upon the doctrine, that where, without the choice or will of a party, the government intervenes, the party is exonerated from the consequences of such intervention. The same principle applies here and it must produce the same result.

It is idle to say that the Deputy Collector's action was wrong and that he ought not to have done as

he did. The subject was within his jurisdiction and when he had acted his action was binding. Even more idle is it to say that the Receivers might have foreseen and provided against such action. They could not be bound to foresee that the Deputy Collector would so wrongfully act, nor to provide against his doing so. They had a right to assume proper action upon his part.

Equally without weight is the suggestion that it was incumbent on the carriers to hold the ship for the unknown and uncertain time necessary to obtain a reversal of the Deputy Collector. The ship was already one day past due when she sailed. The captain, like the captain in the case of *The Styria*, 186 U. S. 1, was obliged to act according to his best judgment in an unforseen emergency, and act for what appeared the best interest of the ship and all the owners of its freight. There is nothing in the record from which the court should infer that the captain ought to have delayed the ship in order to obtain a reversal of the Deputy Collector.

Moreover, it is not apparent that detaining the ship would have done any good. The telegram received from the Collector reads:

> "Department advises that *unless you have evidence tending to show* that the pig lead now at Tacoma * * * is to be used in the war between China and Japan, no reason is perceived why shipment should not be permitted."

From this telegram it appears that the Department was laboring under the same error as the Deputy Collector, and supposed, that if the lead

could be shown to be intended for use in the war, it should be stopped. There is little difficulty in inferring that the lead was actually intended for that use. Its remarkable drop in price at the close of the war, exhibited in the record, is suggestive. It was doubtless contraband. *Boyds Wheaton*, 3d Ed. 631, 650; *President's Proclamation of June* 13, 1864; *Scott's Cases Int. Law*, 765-6 and note; *Taylor Int. Law*, Sec. 657; *General Orders to U. S. Navy* June 30, 1898; *The Styria*, 186 U. S. 1, 14, 16. Therefore, it is not apparent that delay would have secured a clearance.

Nor is there anything in the suggestion that the Receivers were liable for not having notified the plaintiffs earlier, because as pointed out in the opinion of the Circuit Court, there is nothing to show that such notice would have saved, or given an opportunity to save, any part of the loss.

The interference of the collector has another operation. *It absolves the carriers according to the terms of the contract.* We have argued elsewhere that the bill of lading is the contract and need not repeat what is there said. As the preliminary negotiations were had with the understanding on both sides that a bill of lading in usual form would be issued, and as such bill was accepted without objection and negotiated, the engagement of Mr. Fitch that the cargo should go forward by ship, of Oct. 30, was subject to the usual terms of bills of

lading. Among those terms was the "Restraints of Princes" provision,

> "It is mutually agreed that the carrier shall not be liable for loss or damage occasioned by * * * arrest and restraint of princes, rulers or people."

The interference of the collector was most undoubtedly a "restraint of princes, rulers or people" and, unless the bill of lading is to be thrown out of the case, it is a perfect defense to the claim here made for damage to the goods arising from delay.

It cannot be disputed that this provision is ancient, usual and well approved; it, or something equivalent, is in universal use; and as experienced large shippers the plaintiff was bound to expect it in any bill of lading. The preliminary negotiations were therefore all subject to the qualification, that interference of the government would excuse delay.

C. W. BUNN,
For Appellant.

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# Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 24.

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THE NORTHERN PACIFIC RAILWAY COMPANY,
*Appellant*,

vs.

THE AMERICAN TRADING COMPANY.

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## *REPLY TO BRIEF OF APPELLEE.*

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Touching the effect of the Deputy Collector's act, which we rely on as excusing performance of the contract upon exact time, the Appellee states certain positions and relies on some cases which seem to us to require further notice.

1. The curious proposition is advanced that English cases have no application, because of constitutional limitations in this country against impairment of the obligation of contracts. Appellee says it is well settled that no law could be passed by *Congress*, or by any legislature, impairing contracts. We may note in passing that so far as Congress is concerned this statement is by no means free from doubt. But the doctrine we rely upon and the cases supporting it do not rest upon any legislative power to violate the obligation of contracts, but upon the proposition that all contracts are understood to be made subject to the ordinary lawful powers of government. That the performance of a contract to traffic with an enemy is excused by a declaration of war, and that an embargo excuses performance are well settled! *Dermott v. Jones*, 2 Wal. 1, 7; *Hanger v. Abbott*, 6 Wal. 532, 535-6; *Baylies v. Fettyplace*, 7 Mass. 325. The English cases criticised by counsel hold that parties will be presumed to have contracted with reference to the necessity of obeying the laws of their own country, and performance is for that reason excused where obedience becomes illegal. The doctrine is nowhere more accurately stated and discussed than by Mr. Leake, and we beg to refer the court to the Fourth Edition of Leake, pages 497 and 501 instead of to the edition cited in our brief, p. 31.

2. Appellee says the case of *Gosling v. Higgins*, 1 Campb. 451, is directly in point, which we submit it is not. The excuse for failure to deliver in that case was the act of a foreign government, and such an act, not being the law of the country where the contracting parties reside, is held to be no excuse for failure to perform. Several other cases relied on by Appellee rest on the same well settled principle; *Beebe v. Johnson*, 19 Wend. 500; *Blight v. Page*, 3 Bos. & Pul. 295; *Barker v. Hodgson*, 3 Maule & Selwyn, 271; *Ashmore & Son v. Cox & Co.*, 1 Q. B. (1899) 436. With the last case compare *Nickoll v. Ashton*, 2 K. B. (1901) 126. This distinction is clearly stated and all the important English authorities cited by Mr. Leake.

The case of *Evans v. Hutton*, cited by Appellee (brief, p. 23), does not, we think, bear out what is claimed for it. The contract was to carry goods from England to Canton, China. The excuse for performance pleaded was, that when the goods arrived in the neighborhood of Canton the British Superintendent of Trade in China and the captain of a British vessel prohibited their being landed. The plea was demurred to and the question was whether the plea was sufficient. The argument against it and the decision of the court was, that no *authority* was shown in the Superintendent of Trade. It was by no means held that the plea must show he acted without error. It was held that the plea must show he had authority to act. TINDAL, C J., said: "But it is not stated in these pleas, that any such orders were in fact ever given by His

Majesty in Council, nor are any such orders at all set out." COLTMAN, J., said: "But here there is not in substance any authority stated. It is not said by whom he was authorized." ERSKINE, J., said: "It is properly admitted by my Brother Bompas, that if the plea had shewn an interference by the competent authorities of the country it would have been an answer to the action; but this has not been done." MAULE, J., said: "The case has not been argued on the ground that there is any general prerogative of the Crown for doing that which is alleged to have been done by the Commissioner. He could only have the power so to act by virtue of some order of the Privy Council, and there is no statement in the plea that any order of the Privy Council was ever made."

It is noteworthy that this case has never, we believe, been referred to in the English courts. It is not cited by Mr. Leake or, so far as we can find, by any other text writer. If it is good authority in England today, it is plainly distinguishable, because in this case instead of a "Superintendent of Trade," whose commission had to be issued and whose powers had to be defined by an order in Council, we have the Collector of Customs, an officer whose powers are conferred and defined by an act of Congress. Among those powers is the granting of clearances to ships. Whenever the Collector acts on the subject of clearance of a ship, he acts within his lawful authority, and whether erroneously or not, it is the duty of a ship captain to obey; the Collector stands as the Government; he is for

the time being the law. His act may be erroneous, but within his jurisdiction.

The act of Congress having provided no method of reviewing the Collector's decisions it would seem reasonably to follow that Congress intended them to be obeyed by ships. Appellee says in its brief we might have brought mandamus against the Collector. Are we to be held bound to delay the ship for a law suit? And seeing that the Federal Courts have no jurisdiction of mandamus (*McIntire v. Wood*, 7 Cranch 504; *Bath County v. Amy*, 13 Wall. 244; *Davenport v. County of Dodge*, 105 U. S. 237; *Louisiana v. Jumel*, 107 U. S. 711, 727; *Rosenbaum v. Bauer*, 120 U. S. 450) what court would issue the writ? *Graham v. Norton*, 15 Wall. 427.

3. Appellee insists that the Receivers were bound to foresee that the lead might be stopped by the Collector and make such arrangements that it should not be stopped. The telegrams (pages 18 and 19, Record) show why the carriers hesitated to close and carry out the contract. Baird's telegram of September 22 says, "N. P. Steamship Co. have now declined to handle lead for Yokohama," and Baird's final telegram of September 25 says, "Dodwell, Carlill & Co. have consented to accept the lead already contracted." Dodwell, Carlill & Co. were the agents of the Steamship Company. It is obvious that the fear of the Steamship Company was that its ship and other cargo might be subject to capture by reason of the contraband lead.

Appellee refers to the allegation in the petition (Record p. 3 and 4) that the agent Fitch, "having communicated with the Treasury Department at Washington, D. C., as your petitioner is informed and believes, ascertained that the lead would be allowed to go forward and would not be stopped as contraband, and thereupon entered into the contract to ship the said lead." If the allegation were true or could be considered, it would be an additional reason for saying that the carriers were not bound to apprehend, foresee, or provide against, the Collector stopping the ship. But we submit that all the facts which can be considered are those stated in the stipulation, commencing Record, p. 13. It is shown by the stipulation that the petition was filed by the Trading Company and an answer by the Northern Pacific Railway Company. It was thereupon further ordered that the issues be tried before a jury in the common law branch of the court. But while the petition and answer remain on file, no order framing issues for trial was ever made, and the stipulation says, "in lieu thereof the following is a statement of facts agreed upon by the Northern Pacific Railway Company and by the American Trading Company, upon which the case is submitted to the decision of the court, and trial by jury is hereby waived" (Record, p. 14). This makes the statement of facts the equivalent of a special verdict, and the stipulation must be treated as containing all the facts.

4. Appellee states (brief, p. 32) that the possibility of the shipment being excluded from transportation as contraband had been contemplated by the Receivers and the risk of such interference had been assumed by them, which, we submit, is as a statement of facts not justified by the record, and as a proposition of law, begs one of the main controversies in the case.

5. Nothing in the record warrants the statement in Appellee's brief (p. 33) that the telegram (Record, p. 22) advising the Collector of the ruling of the Department was received at Tacoma within half an hour after the ship sailed.

Nor does the record warrant the statement, at the top of page 34, same brief, that had prompt notice been given of the stoppage of the lead, the shipment might have been sent by San Francisco. No fact is stated in the record to sustain or give color to this statement. It is true no notice of the lead being stopped was given to the plaintiff for six days, but there is no proof in the record that, had it been given earlier, the lead might have been moved to San Francisco in time to arrive at Yokohama so as to fill the terms of their contract of re-sale. There is no testimony showing when ships sailed from San Francisco, or how long it would have taken to carry the lead from Tacoma to Yokohama by any other conveyance than a ship of the Northern Pacific Steamship Company.

6. The sailing time of the ship was up when she commenced to unload the lead; she had passengers and other cargo; she had other bills of lading outstanding and all manner of engagements and obligations, of which this court cannot be advised. We think it wholly inadmissible to say that the law obligated the captain to disregard his passengers and his other cargo, all his other obligations, and remain at the port of Tacoma for an indeterminable time in the hope of getting his clearance to sail with the lead.

7. Appellee suggests a remedy over against the Collector on his bond. We submit there is no such remedy. If his act involves the exercise of any judgment or discretion, he is not liable for error; *Kendall v. Stokes*, 3 How. 87; *Otis v. Watkins*, 9 Cranch, 339; *Crowell v. McFadon*, 8 Cranch, 94; *Otis v. Walter*, 2 Wheat. 18; *Martin v. Mott*, 12 Wheat. 31; *Wilkes v. Dinsman*, 7 How. 89, 132; *Gould v. Hammond*, 1 McAll. 235. There would seem no doubt that the Collector exercises judgment and discretion in issuing a clearance. Acts of Congress forbid the sending out of troops, munitions of war, guns, warships and war implements to a nation at war with a friendly power (R. S. Secs. 5281 to 5291). The Collector, we submit, should refuse a clearance if these acts are being violated, or if the ship is violating any other law of the United States (R. S. Secs. 3987, 4200, 4202, 4205, 4206, 4539, 4573). If so, issuing a clearance involves judgment and discretion.

One of the considerations which led to the adop-

tion of the rule that the act of the government excuses performance of a contract was, the want of any remedy over against the government. The distinction cited from Aleyn's reports by Justice LAWRENCE in the case of *Hadley v. Clarke*, and approved by the Supreme Court of Massachusetts in *Baylies v. Fettyplace*, 7 Mass. 325, 331, was:

> "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and he hath no remedy over, there the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract."

Was the stoppage of the ship the act of the government or the individual act of the Collector? If the Collector represented the government in what he did, the defendant should be discharged. If he was a naked trespasser and if his act must be regarded as his personal wrong solely, it cannot discharge the defendant.

8. Appellee suggests that the captain should have sailed without a clearance. Not only would that have been a violation of the statute, but it would have involved the ship in other troubles. Probably Japan and China have rules similar to R. S. 4209, and if so it would be impossible to enter the vessel there without her clearance here. And

Abbott on Shipping, 9th Ed. 288-9. Washington Naval Prize Law 24-28, also 29-34.

especially considering the war and liability to search the captain would have been grossly at fault to have sailed with irregular papers.

C. W. BUNN,
for Appellant.

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# Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 24.

THE NORTHERN PACIFIC RAILWAY COMPANY,
*Appellant,*

*vs.*

THE AMERICAN TRADING COMPANY,
*Appellee.*

# Brief for the American Trading Company.

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# Supreme Court of the United States,

OCTOBER TERM, 1904. No. 24.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Appellant,

vs.

THE AMERICAN TRADING COMPANY,
Appellee.

BRIEF FOR THE AMERICAN TRADING COMPANY.

## Statement.

This is a claim by the American Trading Company against the Receivers of the Northern Pacific Railroad for losses sustained by reason of delay in the transportation of goods to Japan, which the claimant seeks to enforce against the new company through an intervention in the foreclosure suit in pursuance of the provisions of the decree of foreclosure and sale. Under an order of the Court made April 16, 1897, the American Trading Company filed its petition of intervention, and the Northern Pacific Railway Company, the purchaser at the foreclosure sale, subsequently filed its answer thereto. The parties agreed upon a statement of facts and waived a trial by jury by a written stipulation filed April 17, 1901 (pp. 13–29).

The material facts upon which the claim is based, as found by said stipulation, are as follows :

In September, 1894, the Receivers were authorized to continue and were continuing to carry on the business of the railroad in their charge. They had agreements with various connecting carriers by

which through bills of lading were issued to points beyond the lines of the Receivers. Among such carriers was the Northern Pacific Steamship Company, which was an English company, operating a line of steamers between Tacoma and Yokohama (p. 14); but, at the time of the transactions herein referred to, the Trading Company did not know that the Steamship Company was a separate and independent company or that the steamships were not operated by the Receivers (p. 15).

For convenience in transacting their freight business in the eastern part of the United States, the Receivers maintained an office in the City of New York, in charge of George R. Fitch, who was their General Eastern Agent, and made arrangements for the transportation of freight over the Receiver's line of railway and connections, including transportation to China and Japan (p. 15).

The Trading Company, which had its principal office in New York and carried on a general commercial business with Asiatic ports, applied to Fitch for a rate upon a proposed shipment of pig lead from New York to Yokohama, Japan, and informed him that it was of vital importance that the lead should be transported promptly and go forward by the earliest possible steamer without delay, in order to enable the Trading Company to fulfill a proposed agreement which it was about to make for the sale of the lead in Japan, which would require its delivery at Yokohama at a fixed date. Fitch, therefore, named a rate, and "*undertook* to forward the lead from New York on or before September 29th, and via Northern Pacific Steamer "Tacoma," sailing from Tacoma October 30th, 1894" (p. 15).

Thereupon the Trading Company cabled to its agents at Yokohama, naming a price and a date at which the lead could be delivered there; and its Yokohama agents made a contract for the sale of the lead, which provided that it should be delivered in Yokohama by overland route and the most direct connection at San Francisco, Tacoma or Vancouver, and that in case of unusual or extraordinary delay in transit, the contract should be null and void (pp. 15, 16). In order to fulfill its Japanese contract the Trading Company thereupon purchased two hundred tons of pig lead in bond for export (p. 15).

Before naming a rate, the General Eastern Agent of the Receivers had expressed some doubt as to whether lead might not be excluded from transportation as contraband, in view of the war then existing between China and Japan (p. 17); but afterwards, on Sep-

tember 19, 1894, he wrote to the Trading Company confirming the proposition which he had already made, including transportation "from Tacoma *via* Northern Pacific Steamer sailing from thence "October 30th," and asking that an acceptance of the proposition be forwarded as early as possible. On the following day (September 20th) the Trading Company accordingly accepted the proposition in writing.

*This correspondence is printed in the record, page 16, and ratifies and confirms the contract for the transportation and delivery of the lead, as above stated.*

On September 22d the General Eastern Agent of the Receivers wrote to the Trading Company, confirming the routing which he had previously given by telephone and added: "Please advise me as "soon as possible who the shippers will be, that I may order the "cars and also see that same are rushed through without delay, to "connect with *our* steamer at Tacoma" (p. 17).

On September 24th (in pursuance of telegraphic instructions from Baird, the Assistant General Freight Agent of the Receivers, who had previously authorized Fitch to quote the through rate to Yokohama, Fitch informed ~~the General Eastern Agent of the Receivers~~ the Trading Company that he declined to ship the lead upon the ground that it might be contraband of war (p. 18).

In fact, the shipment of pig lead was not prohibited by the Treasury Department at Washington during the war between China and Japan, and on September 25th, the Trading Company made another shipment of pig lead *via* Pacific Mail Steamer sailing from San Francisco, which was, without trouble or delay, transported and delivered in Yokohama (p. 17).

The Trading Company immediately notified Fitch in writing that it would hold the railroad company responsible for any loss that it might sustain from a failure to fulfill the contract (p. 18). Fitch then telegraphed both to Baird and Hannaford (who was the General Freight Agent of the Receivers) that the shippers refused to accept withdrawal, and added: "We have given shippers written con- "tract;" and again: "They state they will hold us to contract;" and asked for prompt advice. Baird then wired to take the lead (p. 19). Thereupon the refusal to accept the shipment was withdrawn, and "*the shipment was made under the contract*" (p. 19) on September 27th at Newark, New Jersey, pursuant to the shipping instructions theretofore given by the General Eastern Agent of the Receivers; *and* "*on the afternoon of September 27, 1894, the shipment*

*left Newark, and started on its journey"* (p. 19). The shipment was made in bond for exportation from Tacoma, and was secured upon the cars by Government locks and customs seals. This was the first shipment ever made by the Trading Co. over the Northern Pacific lines (p. 19).

On September 28th the Trading Company paid the freight charges from Newark to Yokohama, by check drawn to the order of the Northern Pacific Railroad, which was deposited in bank to the credit of the account of George R. Fitch, General Eastern Agent of the Northern Pacific Railroad, and the proceeds were subsequently remitted to the Receivers (p. 20). On September 28th a shipping receipt was issued to the Balbeck Smelting and Refining Company (from which the Trading Company had bought the lead), and was delivered by the Balbeck Co. to the Trading Company, and by the Trading Company was forthwith surrendered to the General Eastern Agent of the Receivers. A bill of lading in the usual printed form was subsequently issued and received by a clerk of the Trading Company, without stated objection to its terms, *but was not read or examined by him or by any officer of the Trading Company*, and was immediately hypothecated with the Hong Kong and Shanghai Bank as collateral security for money borrowed by the Trading Company (pp. 20-21).

At Tacoma the lead was loaded on board the steamship "Tacoma," which was to sail on October 30th, but, about four o'clock on the afternoon of that day, the Deputy Collector of the United States refused to clear the vessel with the lead on board, upon the ground that it was contraband of war, and telegraphed to the Collector at Port Townsend for instructions (p. 22).

On the following day, October 31, the Deputy Collector at Tacoma received a telegram from the Collector at Port Townsend, stating that, unless he had evidence tending to show that the lead was to be used in the war between China and Japan, no reason was perceived why the shipment should not be permitted (p. 22).

In the meantime, however, the lead was unloaded, which delayed the ship until nine o'clock on the morning of October 31st, when it sailed without it (p. 22).

The Trading Company was not informed of this until November 5th, 1894 (p. 22).

The lead finally went forward on December 11th, 1894, and arrived at Yokohama on January 4, 1895, instead of on or about

November 18th, 1894, when it would have arrived had it been transported by the steamship "Tacoma," sailing October 31st (p. 22).

In the interval, hostilities between China and Japan had ceased, the price of lead had fallen very considerably; the purchaser of the lead in Japan refused to accept it, and declared the Japanese contract null and void in consequence of the failure to deliver it promptly in accordance with the terms of the contract; and, as soon as a purchaser could be found, the Trading Company sold the lead for the best price obtainable, which was $27,278.57 less than the contract price (p. 22).

Upon the foregoing facts the Trading Company duly presented to the Receivers, and also to the Northern Pacific Railway Company, its claim for $26,704.02 (which was the difference between the contract price and the market price of the lead in Japan on January 4th, 1895, when it arrived), with interest from that date. Payment was duly demanded, but was refused; and no part of the claim has been paid (p. 22).

The Circuit Court dismissed the petition on the ground that the Receivers were excused by the act of the Deputy Collector, as stated in the opinion printed at page 29 of the Record. The Circuit Court of Appeals reversed the decree of the Court below and directed the payment to the intervenor of the amount of the claim. The opinion will be found at page 40 of the Record.

## POINTS AND ARGUMENT.

### I.

**The contract made by the Receivers, by their agent, was for through transportation to Yokohama, and contained an absolute agreement to ship from Tacoma by steamer to sail on or about October 30, 1894.**

1. This is expressly found by the stipulation itself which states (Third Finding, p. 14) that "for convenience in transacting their freight business in the Eastern part of the United States the Receivers maintained an office in the City of New York which was in September, 1894, in charge of one George R. Fitch, who was their General Eastern Agent and made arrangements for the transportation of freight over the Receivers' line of railway and connections, including transportation to China and Japan;" and (Fifth Finding, p. 15) that "in September, 1894, the Trading Company applied to Fitch for a rate upon a proposed shipment of pig lead from New York to Yokohama, Japan, and informed him that it was of vital importance that the lead should be transported promptly and go forward by the earliest possible steamer without delay in order to enable the Trading Company to fulfill a proposed agreement which it was about to make for the sale of the lead in Japan and which would require its delivery there at a fixed date. Fitch thereupon named a rate and *undertook* to forward the lead from New York on or before September 29th and via the Northern Pacific steamer 'Tacoma' sailing from Tacoma October 30, 1894;" and (Tenth Finding p. 19) "thereupon * * * *the shipment was made under the contract* and the lead, consisting of 200 tons was, in accordance with the shipping instructions given in Fitch's letter of September 22, 1894, shipped at Newark, New Jersey, September 27, 1894."

On September 27th, when the lead was shipped at Newark and started on its journey the bill of lading had not been issued (p. 20) and the finding that "the shipment was made under the contract" is conclusive that the shipment was made under the contract previously made, as found by the stipulation and confirmed by the correspondence between the parties (p. 16).

2. The contract in question was also confirmed by the letters between the parties which are set out in full in the Tenth Finding (p. 16). The letter of September 19th, confirming the undertaking previously made, and the reply of September 20th, constituted a complete ratification and adoption in writing of the contract previously made orally for the transportation and delivery of the lead as therein stated.

3. That this contract was absolute and unconditional and that it was intended to guarantee the through transportation of the shipment to Yokohoma by steamer sailing from Tacoma on October 30, 1894, appears not only upon the face of the correspondence and of the stipulation, but also from the circumstances under which the contract and shipment were made. In applying to Fitch for a rate the Trading Company informed him of the vital importance of prompt delivery to enable it to fulfill its proposed agreement for the sale of the lead in Japan. Fitch understood this and understood that he was assuming the risk, for it appears (Eighth Finding, p. 17) that before naming a rate for the transportation of the lead, Fitch had expressed some doubt as to whether it might not be excluded from transportation as contraband in view of the war then existing between China and Japan; and, as appears from the seventh allegation of the petition, not denied by the answer (p. 3), he communicated with the Treasury Department at Washington and "ascertained that the lead would be allowed to go forward and would not be stopped as contraband, and thereupon entered into the contract to ship the said lead." In reliance upon this undertaking the Trading Company then closed its contract in Japan for the sale of the lead requiring its delivery there without delay (Sixth Finding, p. 15), and Fitch and the Receivers seem to have been informed of this fact on September 24th (p. 16).

4. This was also shown by the correspondence with Hannaford and Baird, and also by the letter subsequently written to the agents of the Steamship Company by Fitch, as General Eastern Agent of the Receivers, in which he said, "*I have made contract guaranteeing delivery of this shipment at Yokohama by our S. S. 'Tacoma,' sailing Oct. 30th.* Will you kindly see that this connection is made without fail?"

5. The theory advanced by the appellant, that in contracting for transportation beyond Tacoma Fitch acted as agent for the Northern

Pacific Steamship Company and that knowledge of the fact must be imputed to the Trading Company, is untenable.

This was the first shipment ever made by the Trading Company over the lines of the Northern Pacific Railroad and its connecting carriers (p. 19). The Trading Company did not know the Steamship Company in connection with the transaction at all, nor indeed that there was any such company, nor that that company owned or had any relation to the steamer "Tacoma." Their entire dealings were with Fitch as the agent of the Northern Pacific R. R. Co. and its Receivers. His letters to them were written upon paper bearing the letter-head of the Receivers, and were signed by him as such General Eastern Agent, and their letters to him were addressed to him in the same capacity.

There is not a word anywhere in the stipulated findings of fact to suggest that the Trading Company ever knew or had any reason to know that Fitch was acting in any other capacity. The officers of the Trading Company were led to believe, and did in fact believe, that the "Northern Pacific Steamer" "Tacoma," referred to in Fitch's contract, was owned by the Northern Pacific R. R. Co. and operated by the Receivers. The correspondence shows they were justified in so believing. Now it appears that by the terms of the traffic agreement between the Railroad Company and the Steamship Company *the two companies were jointly interested in the through traffic*, and the latter company authorized the Railroad Company and its appointed agents to act as agents for the Steamship Company and to issue bills of lading and passenger tickets, and to make and name rates on all traffic for Asiatic ports (Exhibit A, p. 23). But the Trading Company did not know that there was any such agreement (p. 15), or that the Steamship Company was a separate and independent company, and Fitch himself had no direct or independent appointment or authority from the Steamship Company and no authority as its agent except such as may have been created by that agreement, and he knew no more about it than "that an arrangement had been concluded by the Receivers and the Steamship Company by which contracts for through shipment to Yokohama might be made by the agents of the Receivers" (p. 15). All his dealings with the Trading Company were in his capacity as agent of the railroad or its Receivers. He did not himself know that he could act in any other capacity. If he acted as agent of the Steamship Company he evidently did it without knowing it. The Receivers made and collected through rates on shipments to China

and Japan, and the only instructions Fitch received came from them. When Fitch notified the Steamship Company of freight engagements, which he appears to have done occasionally as a matter of favor or precaution, but evidently not in the discharge of any duty to the Steamship Company, he gave the notice in his capacity as General Eastern Agent of the Railroad Company; and in the communications which Fitch received from the agents of the Steamship Company at Tacoma he was addressed as General Eastern Agent, Northern Pacific Railroad (p. 21).

6. The contract was also expressly ratified by the Receivers.

On September 24th, under instructions from Baird, the Assistant-General Freight Agent of the Receivers at their head office in St. Paul (p. 18), Fitch informed the Trading Company that he declined to ship the lead, upon the ground that it might be contraband of war. Obviously Fitch's refusal was based upon the possibility of interference with the shipment after it reached Tacoma, showing clearly his consciousness that the obligation of his contract extended beyond Tacoma. The Trading Company notified Fitch at once that it would hold the Railroad Company liable in damages for the threatened breach of contract (p. 18). Fitch thereupon on September 24th informed Baird that he had already given the Trading Company a written contract, and that it would hold them to the contract (p. 19). Thereupon, with the approval of Baird, the refusal to accept the shipment was withdrawn; the shipment was made under the contract, and the Trading Company paid to the Receivers the through freight on the shipment from New York to Yokohama (p. 20). This confirmation, and indeed all of the telegrams in connection with this shipment included in the stipulation (p. 18), show clearly that the shipment was originally authorized by the Receivers, and was expressly ratified by them.

It seems perfectly clear then from the stipulation, from the correspondence with Fitch, from the correspondence between Fitch and his principals and from all the circumstances in the case, that both the Trading Company and Fitch and also his principals understood that the contract in question was made by Fitch for the Receivers and was for through transportation to Yokohoma via the steamer to sail on or about October 30, 1894, and brings the case clearly within the well-established doctrine that a carrier may by special contract bind himself to deliver beyond the terminus of his particular route.

## II.

### The Receivers had power to make the contract.

By the order appointing them the Receivers were authorized to continue the operation of the railroad and to exercise its authority and franchises and to conduct the business and occupation of a common carrier of passengers and freight and to manage the property at their discretion and in such manner as would in their judgment produce the most satisfactory results consistent with the discharge of the public duties imposed upon them, as appears from the order appointing the Receivers on file in the Circuit Court.

That a common carrier has power to contract for transportation beyond the terminus of its line, even though such carriage extend into another state or country, is well settled.

*Elliott on Railroads, § 1434 and cases cited.*

> " If the carrier, or his servant within the scope of his " employment and duty, enter into any special contract to " deliver at any particular time or place, even beyond the " terminus of his particular route, it will be binding, and the " owner, it would seem, may recover damages with reference " to expected profits had the goods been delivered in time."
>
> *Redfield on Railways, Secs. 189, 191, and cases cited.*
> *Hutchinson on Carriers, § 151, 152.*
> *Ogdensburg, &c., R. R. Co. vs. Pratt, 22 Wall., 123.*
> *R. R. Co. vs. McCarthy, 96 U. S., 258.*

With respect to such contracts and transportation, the Receivers were liable to third parties in all respects to the same extent as the Railroad Company would have been liable by law.

In *Beers vs. The Wabash, St. L. & P. Ry. Co., 34 Fed Rep., 247,* Judge GRESHAM said :

> " Although the property of the Wabash Company is in " custody of the Court it is operated by the Receiver as a " common carrier. His rights and duties are those of a com- " mon carrier."

In *Elliott on Railroads,* the author says :

> § *567.* A Receiver " may contract to carry freight at a spec- " ified rate, even beyond the terminus of his road, to points on

" a connecting road, and an order of the Court is not necessary " to authorize him to do so " § 576. " It accords with sound " principle and reason that a receiver exercising the fran- " chises of a railroad company shall be held amenable in his " official capacity to substantially the same rules of liability " that are applicable to the company while it exercises the " same powers of operating the railroad. And this is the " rule established by the great weight of modern author- " ity. * * * The cases are practically unanimous in hold- " ing that a receiver that assumes to exercise the rights and " a powers of common carrier becomes answerable in his " official capacity for all injuries and losses sustained by per- " sons dealing with him in that capacity to the same extent " in general that the corporation would have been liable."

*Hutchinson on Carriers, § 67a.*

*Beach on Receivers, § 371.*

*Central Trust Co. vs. N. Y. City & Northern. R. R., 110 N. Y., 257.*

*Little, Recr., vs. Dusenberry, Adm., 46 N. J. Law Reps., 614.*

*Wall vs. Platt, 169 Mass., 400.*

In *Kansas Pacific Ry. Co. vs. Bayles (Supreme Court, Colo.), 35 Pac. Rep., 744,* it was expressly held that Receivers have such power, and the Court said:

" The agreement being to carry goods from New York, " Chicago and St. Louis to Denver while the appellant's " road did not extend east of Kansas City, it is urged that " the making of the contract was beyond the power of the " receivers. We do not think this contention is well " founded. The receivers, subject to the orders of the court " from whom their authority emanated had full power to " conduct the business of the corporation according to ap- " proved methods of operating such enterprises; and no " reason is perceived why such officers should not be per- " mitted to make contracts for the carriage of freight and " passengers beyond the limits of the road immediately under " their control. Such contracts are usual, and perhaps neces- " sary, in many instances, to the successful operation of the " business of common carriers, and are also a great public " convenience."

The language quoted by the appellant from *Chicago Deposit Vault Co. vs. McNulta, 153 U. S., 554,* was used with reference to a long lease made by Receivers, involving a large annual expenditure and related to the rent subsequent to the termination of the receivership. But the question in this case re-

lates to the ordinary and usual administration of the property and the authority of the Receivers to carry on the operation of the property and the business of the company necessarily empowers them to make such contracts with reference to the transportation of passengers or freight as the company might have made. If the duty were cast upon shippers of seeing to it that Receivers do not exceed their authority in such respects, it would be impossible for Receivers successfully to carry on business.

In this case the Receivers had sufficient power and authority to solicit and accept from the petitioner the shipment in question which the shipper might have sent by another line without any trouble or delay (as it did another shipment at about the same time) (p. 17); they had sufficient power and authority to retain and confirm the arrangement for the shipment when, upon their proposal to withdraw, the Trading Company expected to ship via San Francisco (p. 19); they had sufficient power and authority to obtain and accept from the petitioner the sum of $3,360.05 in payment of the full freight from Newark to Yokohama (p. 20), and they cannot now repudiate the transaction and say that, although they had sufficient power and authority to get for themselves the benefits of this contract, they were not authorized to assume the burdens.

## III.

**The contract was within the scope of Fitch's authority, as General Eastern Agent of the Receivers, and it was also adopted and expressly ratified by them.**

"For convenience in transacting their freight business in the "Eastern part of the United States, the Receivers maintained an "office in the City of New York, which was in charge of one George "R. Fitch, who was their General Eastern Agent, and made ar-"rangements for the transportation of freight over the Receivers' "line of railway and connections, including transportation to China "and Japan" (p. 14).

1. The real authority of an agent is equal to his apparent authority, and he can make any contract relative to the business under his management which could be made by his principal.

"The powers of the agent are *prima facie* coextensive "with the business intrusted to his care, and will not be "narrowed by limitations not communicated to the person "with whom he deals."

*Insurance Co. vs. Wilkinson, 13 Wall., 222, 235.*

In *Goldwater vs. Liverpool, &c., Co., 39 Hun, 178 (affirmed 109 N. Y., 618)*, the Court said:

"Whatever the company can lawfully do itself through "the agency of its executive officers at its home office, can "in general be done by the agent who represents it in the "place where the contract was made relative to the business "of which he is the superintendent."

*Pechner vs. Phoenix Ins. Co., 65 N. Y., 195.*
*Lowenstein vs. Lombard, Ayres & Co., 164 N. Y., 324.*

"The authority of an agent may be implied in many "cases from his official designation, the position in which "he is placed and the duties which naturally appertain "thereto. Parties may deal with the agents of corporations "upon the presumption that they possess the powers "usually assigned to the offices they hold, and the principal "is bound as to third persons acting in good faith by the "act of an agent within his apparent authority, although "in the particular instance it was unauthorized."

*Isaacson vs. N. Y. C. & H. R. R. R. Co., 94 N. Y., 278, 285.*
*Talcott vs. Wabash R. R. Co., 159 N. Y., 461, 469.*
*Porter on Bills of Lading, Sec. 159.*
*Hutchinson on Carriers, Sec. 267.*

A general freight agent has authority to contract for the carriage of goods beyond the limit of the carriers line.

*Ray on Negligence of Imposed Duties, p. 400.*
*White vs. M. P. R. Co., 19 Mo., App, 400.*
*Grover & Baker Sewing Mach. Co. vs. Mo. Pac. R. R. Co., 70 Mo., 672.*

The agent of a railroad has power to stipulate for carriage within a specified time.

*Strohm vs. Detroit, &c., R. R., 23 Wis., 126.*

Fitch had authority to bind his principals to forward the goods per steamship "Tacoma," sailing October 30th.

*Goddard vs. Mallory, 52 Barb., 87.*
*Goodrich vs. Thompson, 44 N. Y., 324.*

It appears clearly from the facts in the case that Fitch was the General Agent of the Railroad Company and the Receivers in the East. He was in charge in their office in New York, maintained for the transaction of their freight business. He was authorized to make arrangements for the transportation of freight over their lines of railway and connections, including transportation to China and Japan. All of his correspondence in connection with such freights, both with the officers of the Receivers at St. Paul and also with shippers, and also with the agents of the Steamship Company, appears to have been conducted by him in his capacity as such General Eastern Agent. All of his transactions in soliciting and arranging for freight appear to have been carried on by him in the same capacity. He was authorized to collect the freight money, and he deposited it in an account which he had opened in a bank in New York as such General Eastern Agent, and all freights so received and deposited by him were remitted by him to the Railroad Company or its Receivers.

While it is found by the stipulation that Fitch had no express general authority to make contracts for through transportation, except as provided by the bills of lading, "and no express authority to make the contract in question, unless such express authority be found in the telegrams," of which copies are set forth in the stipulation, it is likewise found that the American Trading Company did not know the terms of his express authority. But it is entirely unnecessary that he should have had any such *express* authority, because his appointment to act as the General Eastern Agent of the Receivers and to make arrangements for the transportion of freight over the Receivers' line of railway and connections, including transportation to China and Japan, and his course of dealing under it, as shown by the stipulation, were sufficient to raise an implied authority, so far as innocent shippers are concerned, to do anything which the Receivers themselves might have done in reference to such freight.

It is evident that Fitch exercised, and in performing his duties had to exercise, large discretionary powers and that he did so with the consent of the Receivers (p. 19). He determined the routing of

through shipments to Yokohama, that is to say, the lines over which through shipments went forward (p. 19, p. 16). His appointment as the General Eastern Agent of the Northern Pacific Railroad antedated the appointment of the Receivers themselves (p. 20). They continued him in office, and there is not a particle of evidence, and it is inherently improbable that they interfered with the established course of business in the East.

Clearly Fitch's relation to the business was such that he had authority to make any shipping contract which could have been made by the Receivers themselves.

2. Moreover, the receivers expressly authorized Fitch to accept the shipment for transportation to Yokohama (pp. 18, 19). Afterwards on September 22d they notified Fitch to cancel his quotation. On September 24th he replied: "Shipment lead to Yokohama is now "being made. Shippers refuse to accept withdrawal. We have "given shippers written contract" and also: "Have notified Amer- "ican Trading Company that shipment will be refused. They state "they will hold us to contract. They are shipping hundred tons "from Denver to Yokohama by steamer 'City of Rio' from San "Francisco October 4th, and expect to forward this shipment same "way. Will charge us difference in rate. Advise quick." Upon this, a telegram was sent to Fitch from the general office of the Receivers at St. Paul, authorizing him to accept the lead (p. 19). This interchange of messages between Fitch and the general office of the Receivers at St. Paul was not known to the Trading Company (p. 19): but the telegrams disclose important evidence of the direct responsibility of the Receivers for the contract in question, and of their negligence in failing to procure the due performance of it.

The telegrams show that the Receivers knew that, by a special contract *which was not the bill of lading*, their general Eastern agent had undertaken to provide through transportation to Yokohama. They knew the "written contract" referred to by Fitch (p. 19) was not the bill of lading, because the suggestion contained in the message "Think we should receipt for lead subject to delay," could only refer to a shipping receipt or bill of lading, which they knew therefore, or at least assumed, had not been issued, and, indeed, it was apparent from the messages that the lead had not then been shipped nor the bill of lading issued.

The Receivers had been advised by the refusal of the steamship company to handle lead for Yokohama, Kobe, Hong Kong and

Shanghai, that it might be excluded from transportation upon the ground that it was contraband, in view of the war which was then pending between China and Japan. The refusal could have been based upon no other ground. Fitch so understood it; and upon the receipt of the request from the Receivers, "Please cancel your quotation," he informed the Trading Company at once that he declined to ship the lead upon the ground that it might be contraband of war (p. 18).

The Receivers knew that the contract provided for exportation per steamship "Tacoma," sailing from Tacoma, October 30, 1894. On September 25th, which was two days before the lead was loaded upon the cars at Newark, they had telegraphed to Fitch for quick advice as to how the lead was to be forwarded (p. 19); and it is not likely that the request was denied, although, unfortunately, it has not been possible to produce the despatch by which the information was conveyed.

The Receivers, therefore, were informed that a special written contract for the transportation had been made, and were also informed of the obligations which it created, or, if not fully informed as to all the details, they had full opportunity to inform themselves, and it was their duty to do so. Nevertheless, they expressly authorized their agent to accept a shipment of the lead under the special contract, merely suggesting that it should be receipted for, subject to delay. They cannot now repudiate it.

The words, "Think we should receipt for lead subject to delay," used in a telegram, where short forms are the rule, are full of significance. They indicate very clearly that the Receivers supposed *they* were incurring liability for delay, although the delay which they contemplated was that which would occur at Tacoma if the transshipment of the lead should be prevented upon the ground that it was contraband of war. Nevertheless, the despatch was not mandatory; and it is fair to assume that, having authorized the acceptance of the shipment under the contract, the Receivers intentionally refrained from creating a condition which would have been inconsistent with the contract.

Fitch clearly had full authority, both by implication by reason of his appointment as General Eastern Agent and the established course of business, and also by express ratification by the Receivers, to represent and bind them in making the contract in question.

## IV,

### The contract was not merged in or modified by the bill of lading.

Before the bill of lading was issued the previous contract for transportation had been made and confirmed in writing, the freight for the entire transportation had been paid to the Receivers, the lead had passed from the control of the claimant, had been locked in the cars under Government seals in bond, and had started on its journey across the continent (Finding 10, pp. 19, 20).

And relying upon this contract to transport the lead to Yokohama by steamer to sail from Tacoma on October 30th, the Trading Company had made an absolute engagement to deliver the lead in Japan at a fixed date, and had purchased and shipped the lead to enable it to fulfill that obligation (pp. 15–16). Thus, before the bill of lading was issued, the Trading Company had incurred a heavy liability on the faith of its contract rights.

The rights of the claimant thus had become fixed, and it could not be deprived of those rights, except upon adequate consideration and with its consent.

The consent of both parties was just as essential to the annulment or modification of the contract as to its inception.

*Wheeler vs. New Brunswick, &c., R. R. Co., 115 U. S., 34.*

1. The Receivers claim that the subsequent receipt of the bill of lading by the claimant constituted such an assent.

But it is well settled that assent to the modification of a shipping contract, under which goods have gone forward, will never be implied from the subsequent receipt of a bill of lading without stated objection to its terms.

*In Bostwick vs. Baltimore & Ohio R. R. Co., 45 N. Y., 712,* an oral agreement was made by the plaintiff with the agent for a line of railroads, of which that of the defendant formed a part, for the transportation of cotton from Cincinnati to New York by all rail, and the plaintiff had agreed to pay the all-rail rate in New York. After making this contract the plaintiff delivered the cotton at the depot and took depot receipts, and sent the receipts to the office of the agent, to obtain bills of lading. The agent did not deliver any bill of lading at the time, but one or two days afterwards, sent a

bill of lading to the plaintiff's office. The goods had then been shipped. A loss having occurred, the defendant claimed exemption from liability by reason of certain printed conditions contained in the bill of lading.

The Court said (p. 716):

> "The rule that prior negotiations are merged in a subsequent written contract does not apply to such a case as this. If the plaintiff had expressly assented to the terms of the bill of lading subsequently delivered to him, such assent would operate as a change of the terms of the contract originally made and under which he had parted with his property. But after the verbal agreement had been consummated and rights had accrued under it, the mere receipt of the bill of lading, inadvertently omitting to examine the printed conditions, was not sufficient to conclude the plaintiff from showing what the actual agreement was under which the goods had been shipped."

In *Missouri Pacific Ry. Co. vs. Beeson, 30 Kan., 298*, the plaintiff in error was a common carrier from a point in Kansas to a point in Missouri and had entered into a parol contract with the defendant in error to carry goods from Paola, Kansas, to Philadelphia, Pennsylvania. Under this contract, the defendant in error delivered certain wool to the plaintiff in error for transportation. After the wool was all delivered and put into the cars and the cars locked, the agents of the railway company handed to the defendant in error bills of lading, which showed that the wool was to be carried from Paola, Kansas, to St. Louis station. The defendant in error did not read the bills of lading, but glanced at them to see that the number of sacks of wool and the weight were correct, and that the consignees were named in the bill. The defendant in error believed that the wool was to be carried to Philadelphia, and did not know that the bill of lading indicated anything else. The Court said:

> "There is nothing in the record to show that the plaintiff [below] acquiesced in that portion of the bills of lading which stated that the wool was to be carried to the St. Louis station, except that the plaintiff received the bills and made no objection; but, as he stated in his testimony at the trial, he did not read the bills, and did not know that they apparently changed the contract between the parties."

The Court held that the defendant in error was entitled to recover on the parol contract, citing *Railroad Co. vs. Manufacturing Co., 83 U. S., 319*, and added:

> "A bill of lading signed by one party only, read by one party only, and understood by one party only, can hardly

" be held to overturn and destroy a previous contract entered
" into by and between both parties, when the original con-
" tract has been principally executed and fulfilled on the
" part of one of the parties, and by that one who did not
" understand the contents of the bill of lading, and who is to
" suffer if the original contract is to be considered as over-
" turned and destroyed. After the wool was loaded upon
" and within the cars, and the cars were locked, it was hardly
" the proper time for the defendant (plaintiff in error) to
" change the original contract."

*Swift vs. The Pacific Mail S. S. Co., 106 N. Y., 206.*
*Mobile & Montgomery R. R. Co. vs. Jurey, 111 U. S., 584.*
*Park vs. Preston, 108 N. Y., 434.*
*Gillaume vs. Gen. Transptn. Co., 100 N. Y., 491.*
*Strohm vs. Detroit and Milwaukee Ry. Co., 21 Wis., 545.*
*King vs. Woodbridge, 34 Vermont, 565.*
*Hutchinson on Carriers, Secs. 246, 247.*
*McAbsher vs. R. R. Co., 12 S. E. Rep., 892.*
*Hamilton vs. R. R. Co., 96 N. C., 398.*
*Central R. R. Co. vs. Dwight Mfg Co., 75 Ga., 609.*
*Baker vs. Mich. S., &c., R. R. Co., 42 Ill., 73.*
*Merchants Dispatch Tr. Co. vs. Furthmann, 149 Ill., 66.*

As was said by Mr. Justice Davis in *R. R. Co. vs. Mfg. Co., 83 U. S. (16 Wall.), 318, 329.*

" If the parties were on an equality in their dealings with
" each other, there might be some show of reason for assum-
" ing acquiescence from silence; but, in the nature of the
" case, such equality does not exist, and, therefore, every in-
" tendment should be made in favor of the shipper, when he
" takes a receipt for his property with restrictive conditions
" annexed and says nothing, that he intends to rely upon the
" law for the security of his rights."

The bill of lading was issued and accepted merely as a receipt for the goods and as evidence of title to them (*Pollard vs. Vinton, 105 U. S., p. 8*).

That it was so intended and understood and was not regarded by either party as a merger, or modification of the existing contract, is clear. The necessary basis and condition of the whole transaction at the outset was clearly understood to be the prompt delivery in Japan.

The Trading Company certainly never intended to assent to any modification or waiver of that condition, for, in reliance upon it, they had already bound themselves by their contract in Japan; and it is

inconceivable that they would consciously assent to any change which would impose upon them the risk of delay which would cause not only a loss upon the goods, but a possible liability to their purchaser for large damages as well, a risk which they had no power to protect themselves against and which had been assumed by the Receivers. And, indeed, it expressly appears that the Bill of Lading was never read or examined by the clerk who received it nor by any officer of the Trading Company (p. 21).

That the agent of the Receivers never understood or intended that there should be any change in that condition is equally certain. He understood the vital importance of prompt delivery and that the Trading Company relied upon the Receivers to secure it. When Baird instructed him to withdraw his quotation he replied on September 24th, several days before the bill of lading was issued, that he had already given the shippers a written contract, upon which they would hold the Receivers liable (p. 19). *And even the day after the bill of lading had been issued, Fitch expressly declared in writing "I have made a contract guaranteeing delivery of this shipment at Yokohama, by our S. S. Tacoma sailing October 30th"* (p. 21).

2. The subsequent dealings of the Trading Company with the bill of lading do not constitute an acceptance of its terms.

As we have already seen the Trading Company received the bill of lading but did not examine it or know its terms or discover that it in any wise differed from the contract already made upon which the Trading Company relied. Nor did the Trading Company receive or accept the bill of lading as a contract or as in any way modifying the contract previously made. The bill of lading was received as evidence of the Trading Company's title to the lead in question and was at once transferred by it without examination to the Hong Kong and Shanghai Bank as security for a loan. The bill of lading was transferred merely as a substitute for the lead itself and for the purpose of passing title to it.

While a bill of lading represents the title to the goods, and also contains stipulations which may create a contract between the parties, it is apparent that in this instance it operated merely as a receipt for the goods and as evidence of title to them, inasmuch as the contract for transportation had already been made in writing and it was not intended in any way to vary or change it. Such being the case, the mere transfer of the bill of lading to the Bank

as security for a loan does not indicate or imply any intention on the part of the shipper to assent to the terms of transportation stated in the bill of lading or to any modification of the contract already in existence. On the contrary the fact that immediately upon its receipt the bill of lading was so transferred to the Bank only strengthens and confirms the conclusion to be drawn from the finding that the Trading Company did not examine the bill of lading or become acquainted with its terms.

It is equally clear that the dealings between the Trading Company and the Bank in respect to the bill of lading could not affect the relations between the Trading Company and the carrier. As pointed out in the opinion of the Court below these dealings were *res inter alios acta.*

The question is one of intention, *i. e.*, whether the Trading Company intended by this bill of lading to modify the terms of the contract previously made. We have already seen that they did not, and clearly the fact of their transfer of the bill of lading to the Bank does not indicate any such intention any more than the receipt of the bill of lading from the carrier.

It is quite clear that the Trading Company's dealings with the Bank could not affect the carrier's obligation to the Trading Company.

*Gaines vs. Union Trans. & Ins. Co., 28 Ohio St., 418.*

The cases of *The Hyde, 82 Fed. Rep., 681,* and *Rubens vs. Ludgate Hill S. S. Co., 20 N. Y. Supp., 481,* cited for the Receivers, have no application, for in both of those cases the bill of lading constituted the agreement and there was no previous agreement. In the case of the *Ludgate Hill,* that was expressly admitted (20 N. Y. Supp., 484). In the *Hyde* case the Court expressly says that it is the acceptance of the bill of lading "at the time of the delivery of the goods for shipment which binds the shipper."

## V.

**The failure to perform the contract was not excused by the unlawful refusal of the Deputy Collector at Tacoma to clear the ship with the lead on board.**

His refusal did not make the exportation of the lead either illegal or impossible, and if it had done so that would not relieve the Receivers from liability.

The Deputy Collector's act in refusing clearance is conceded to have been unlawful, and, clearly, it was so.

*Record, Finding Eighth, p. 17.*
*Treasury Decisions, August, 1865–1883.*
*Hendricks vs. Gonzales, 67 Fed. Rep., 351.*

1. The Receivers, however, claim that even though the collector's act was not lawful, it, nevertheless, made performance illegal and therefore excused the failure. And, in support of this claim, they cite certain statements contained in some English cases to the effect that where the performance of a covenant has been rendered unlawful by an Act of Parliament the courts will not enforce the contract.

*(a)* In Great Britain, Parliament is supreme, and it might well be that a different rule would prevail there than in this country where the powers of Congress are subject to constitutional limitations to be construed by the courts. No case can be found in the United States in which it has been held that illegality subsequently arising could affect the validity of a contract previously entered into and lawful when made. And it is, of course, well-settled that no law could be passed by Congress or by any Legislature impairing the obligation of any contract previously made. So that it must be evident that the doctrine suggested by the appellant, as laid down in some of the English cases, can have no application in this country. In other words, that there can be no such thing as illegality subsequently arising which could take the case out of the operation of the rule as laid down in respect to impossibility of performance subsequently arising. And in line with this view it was said in the case of *Davis vs. Wallace, 3 Clifford, 123–131,* "where the contract is that the ship shall be unladen within a certain number of days, it is no de-

fense to an action for demurrage that the over-delay was occasioned by the crowded state of the docks, or by port regulations or Government restraints." Even in England the cases are not harmonious. Brasoa v. Knox, 3 Mod

*(b)* But the doctrine cited from the English cases does not hold that performance will be excused when prevented by an *unlawful* act but only when prevented by law, and the complete answer to the suggestion of the Receivers is that the performance of this contract did not become illegal in consequence of the unlawful interference by the Collector, and that even under the English law it is well settled that, under such circumstances, the carrier would not be excused, but would be liable to the shipper, and would then have his action for damages against the official who unlawfully and improperly interfered.

*Gosling vs. Higgins, 1 Campbell, 451,* is directly in point. It was an action for the non-delivery of ten pipes of wine shipped at the Island of Madeira, on board a vessel of which the defendant was owner, to be carried to Jamaica and from thence to England. When the vessel arrived off Jamaica, she was seized with her cargo for a supposed violation of the revenue laws, and there condemned; but upon an appeal to the Privy Council in England, the sentence of condemnation was reversed. In an action by the shipper to recover from the owner of the vessel for the value of the goods, for failure to deliver to the consignees, the defendant claimed that inasmuch as the goods could not be delivered by reason of an act of Government, the defendant could not be held liable. But Lord ELLENBOROUGH, who gave the opinion in Barker vs. Hodgson, quoted by the appellant, decided that the plaintiff was entitled to recover and said: "You have an action against the officers. The shipper can only look to the owner or the master of the ship."

*Evans vs. Hutton, 12 L. J. C. P., N. S., 17:*

This was an action by the shipper against the shipowner for not delivering cargo at Canton to the consignees, British subjects, pursuant to charter party. The defense was that, "after the ship with the goods on board had arrived near the port of Canton, certain persons then there, being officers of the Queen, duly authorized in that behalf and then exercising the powers of Her Majesty's Government, prevented the defendants from delivering the goods at Canton" and that hence the defendant was excused. On special demurrer the plea was held bad, the Court, TINDAL, C. J., holding

that although the plea stated that the officers in question were duly authorized and exercising the powers of Her Majesty's Government, still it must go further and show that the power so exercised was lawfully authorized by Act of Parliament, and the Court said:

> "It is, however, clear that the pleas intend to set up a dissolution of the contract in consequence of the acts of these officers of Government. We must, therefore, see whether under the Act of Parliament the superintendent has any power such as it is stated in the plea he exercised."

In the case at bar the Collector instead of being authorized by Act of Congress to refuse clearance as he did, was expressly required by that Act to grant it.

It seems clear then that, even under the English authorities, the performance of the contract in this case would not be excused by the unlawful refusal of the Deputy Collector at Tacoma to clear the ship with the lead on board. If the export of the lead had been made unlawful by subsequent act of Congress and the interference of the Collector had been lawful, then the question suggested in the English cases might arise, were it not for the lack of power in Congress to pass an act impairing the obligation of a contract previously made. But that is certainly not the question here. For it is clear that the export of the lead was perfectly lawful and that the vessel had a right to the clearance with the lead on board.

*(c)* It might fairly be claimed that it would have been proper and possible for the vessel to sail without clearance. Section 4197 of the Revised Statutes, provides merely that the master or person having the charge or command of any vessel bound to a foreign port shall deliver to the Collector of the District, from which such vessel is about to depart, a manifest of its cargo; and this section does not, in terms, forbid a vessel to depart without clearance, but merely provides that, if any vessel bound to a foreign port shall depart without delivering such manifest and obtaining a clearance, it shall be liable to a penalty of $500 for each and every such offense. *But the same section does make it the duty of the Collector to grant a clearance* for it says that upon the delivery of such manifest "*the collector shall grant a clearance for such vessel and her cargo.*" So that it might be argued, if necessary, that where the Collector, unlawfully and in violation of his duty as prescribed by this section, refuses to grant a clearance, the vessel would be justified in sailing without it, subject, of course, to the payment of the

fine fixed by the act, which it could then recover from the Collector.

For it is well settled that such fine, together with any damages which the charterer of the vessel may have suffered by reason of the unlawful act of the Collector would support an action by the charterer against the Deputy Collector for his unlawful act.

*U. S. R. S., 989.*
*Hendricks vs. Gonzales, 67 F. R., 351*
*Schell vs. Cochran, 107 U. S., 625.*
*Cruikshank vs. Bidwell, 176 U. S., 73–81.*
*U. S. vs. Sherman, 98 U. S., 565.*

*(d)* But, if Section 4197 of the Revised Statutes is to be regarded as, under all circumstances, prohibiting the vessel from sailing without a clearance, the Collector was expressly required to grant one, and it was the plain duty of the Receivers not to tamely acquiesce in his unlawful refusal to do so and attempt to visit the consequences upon the innocent shipper, who had no notice or knowledge of it, but to take active steps to compel the Collector to do his duty and to hold him liable for any damages resulting from his failure.

Had they done this the refusal would certainly have been promptly revoked and the vessel allowed to proceed. They might even have applied for a mandamus, which would necessarily have been granted.

If a carrier by water were to be allowed to escape from its obligations because a Collector contumaciously or unlawfully refused clearance its contracts would be worthless.

2. Nor was the performance of this contract rendered impossible by the act of the deputy collector.

The laws of the United States permit its citizens to deal in contraband of war and the exportation of lead was not in fact prohibited by the Treasury Department during the war between China and Japan. The receivers were bound to know or to ascertain what the law was upon the subject if they did not know, and indeed, they undertook to do so.

The Deputy Collector refused to clear the vessel about four o'clock in the afternoon of October 30th, and telegraphed to the Collector at Port Townsend for instructions. On the following day (October 31) he received instructions from the Collector to the effect

that there was no reason why shipment should not be permitted. The Receivers, instead of holding the vessel the short time necessary for the receipt of an answer to the Deputy Collector's telegram, in violation of their contract and of their plain duty, permitted the lead to be unloaded and the vessel to sail at 9 A. M. of the 31st, the same day upon which the instructions were received, which would have permitted the lead to go forward without trouble or delay.

As we shall argue under our next point, it was the plain duty of the Receivers, having assumed this obligation, to ascertain, in advance of the arrival of the lead at Tacoma, what the law was and to arrange for the prompt exportation of the lead there, in which case no delay whatever need have occurred; and it is clear that but for their failure to do so and but for their failure to hold the vessel for the short portion of a day (in fact less than half an hour) necessary to receive an answer to their telegram, the transportation of the lead would have been permitted and their contract could have been carried out according to its terms.

Even if the Receivers were prevented from a literal compliance with the terms of the contract they were still bound to perform it in substance.

*Williams vs. Vanderbilt, 28 N. Y., 217, 223.*

3. Moreover, the law is well settled that impossibility of performance arising subsequently to the making of a contract constitutes no defense.

The latest statement in this Court of the law upon this subject is contained in *Jacksonville vs. Hooper, 160 U. S., 514–527*, where the Court, after referring to certain instances of impossibility of performance existing at the time of making the contract—such as non-existence of the subject matter or legal or physical impossibility apparent on the face of the contract, says:

> " But the present case does not fall within either of these " classes, but is a case of impossibility of performance aris- " ing subsequently to the making of the contract.
>
> " Here, the general rule is that such impossibility, even " though it arises without any fault on the part of the cove- " nantor, does not discharge him from his liability under the " contract. 'The principle deducible from the authorities is " ' that if what is agreed to be done is possible and lawful, it " ' must be done.' * * * Impossible conditions cannot

" be performed; and if a person contracts to do what at the
" time is absolutely impossible, the contract will not bind
" him, because no man can be obliged to perform an impossi-
" bility. But where the contract is to do a thing which is
" possible in itself, the performance is not excused by the
" occurrence of an inevitable accident, or other contingency,
" although it was not foreseen by the party, nor within his
" control."

*Hutchinson on Carriers. Sec. 317*, states the rule as follows:

" If a carrier has agreed to carry the goods to their des-
" tination and deliver them within a prescribed time, he will
" be held to a strict performance of his contract, and no
" temporary obstruction, or even absolute impossibility, will
" be a defense to an action for failure to comply with the
" engagement; for when a party, by his own contract, cre-
" ates a duty which he engages to perform, he is bound to
" make it good, notwithstanding an accident or delay by
" inevitable necessity, because he might have provided
" against it by his contract."

*Jones vs. U. S., 96 U. S., 24, 29.*

*Robson vs. Mississippi River Logging Co., 61 Fed. Rep., p. 900, affirmed, 69 Fed. Rep., 777.*

*The Harriman, 9 Wall., 161:* In the opinion in this case, from which the Court quotes in the above case of *Jacksonville Ry. vs. Hooper*, Judge SWAYNE quotes with approval from *Paradine vs. Jane (Alleyn, 26)*, as follows:

" When the party by his own contract creates a duty or
" charge upon himself he is bound to make good if he may,
" notwithstanding any accident by inevitable necessity, be-
" cause he might have guarded against it by his contract,"

and also cites with approval *Beebe vs. Johnson, 19 Wend., 500*, where the defendant agreed to secure in England for the plaintiff the exclusive right to make, use and vend in the Canadas a machine covered by a patent from the United States. It was found that this could only be done by an act of the British Parliament. As such a grant, however improbable, was not impossible, it was held that the case was within the rule laid down in *Paradine vs. Jane*, and that the covenantor was liable for the breach of his agreement.

The Court also cites with approval *Blight vs. Page, 3 Bosanquet & Puller, 295*, which is almost on all fours with the case at bar. In that case a charterer agreed to load a ship at Liebeau with barley. The ship went there to receive the cargo. The factors of the shippers informed the master that the Rus-

sian government had forbidden the exportation of barley, and that no loading could be furnished. The ship returned in ballast. The charterer was sued for the breach of the contract and held liable.

The Court also cited with approval *Barker vs. Hodgson, 3 Maule & Selwyn, 271*, where a charterer covenanted to freight a ship at Gibraltar with a homeward cargo. A pestilent disease broke out there, and all public intercourse was forbidden by law. Lord ELLENBOROUGH said:

> "If in consequence of events which happen at a foreign port the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages."

The Court also cited with approval the case of *Meredos vs. Hill (8 Bingham, 235)* where an owner, by a charter-party, agreed that his ship should proceed from Liverpool to Terceira, and deliver her cargo. Terceira was under blockade, and both parties knew it. There was no intention to break the blockade. The ship did not go. The owner was held liable, and the rule laid down in *Paradine vs. Jane* was cited and approved.

*Ashmore & Son vs. C. S. Cox & Co., 1 Q. B. Div.*, [1899], page 436:

In this case the plaintiffs claimed damages for breach of contract, alleging the sale by the defendants to the plaintiffs of a quantity of Manila hemp, to be shipped from the Philippine Islands to London by sailer between May 1 and July 31, 1898. The defendants by reason of the Spanish-American war were unable to ship between the dates named, but made a declaration upon a shipment by steamer in September, which plaintiffs refused to accept upon the ground that it was not shipped in accordance with the contract. The defendants thereupon notified the plaintiffs that the declaration made by them was the only one which they could make.

The Court by Lord RUSSELL, C. J., held that the agreement that the shipment should be made by sailer between May 1 and July 31, 1898, was a condition precedent, and that the plaintiffs were not excused by the impossibility of performance. The defendants claimed that it was an implied condition of the contract that it should be possible to ship by sailer between the dates named.

Upon this question the Court held that the defendants had "taken upon themselves the absolute responsibility of being able to make a declaration complying with the contract":

"They had taken upon themselves * * * the responsibility that those events shall take place, or that they will pay damages if from any cause they are prevented from carrying out the contract. I therefore hold that there was no such implied condition."

It has been repeatedly held, as stated in *Parsons on Contracts, Vol. 1, p. *566:*

"Where an engagement to deliver goods is absolute, a "party cannot excuse himself for non-delivery by showing "that he was prevented from carrying out his contract by "the blockade of a port, or by any other insuperable ob-"stacle."

*Addison on Contracts, *pp. 1195, 1198.*
*Atkinson vs. Ritchie, 10 East., 530.*
*Harmony vs. Bingham, 12 N. Y., 99.*
*Hale vs. Rawson, 4 C. B. (N. S.), 85.*
*Higginson vs. Weld, 14 Gray, 165.*
*Splidt vs. Heath, 2 Camp., 57.*
*Spence vs. Chadwick, 10 A. & E. (N. S.), 517.*
*Hayward vs. Scangoll, 2 Camp., 56.*
*Story on Contracts, § 1334.*

4. There seems to be no question as to the law, and the only question in a given case, we apprehend, would be whether the contract upon a fair interpretation provides for doing the thing which subsequently becomes impossible.

There is no such question in this case. This claim does not rest upon the receiver's common law liability as carriers, but upon their liability under a special contract. As we have already shown, the receivers absolutely agreed to forward this lead by steamer to sail from Tacoma October 30, and there can be no doubt, under the admitted facts in the stipulation and the correspondence of the parties, that the receivers fully understood and intended to assume this obligation and any risk which might attend it, and became subject to the rule of law above stated.

5. The Receivers, however, claim that the rule above stated does not apply where the parties at the time of making the contract cannot have had in mind the precise obstacle or contingency that subsequently prevents its fulfillment, and in support of that contention they quote a statement in the opinion in *C. M. & St. P. Ry. vs. Hoyt (149 U. S., 1).*

The Receivers' construction of that opinion clearly is not the correct one. The statement quoted was made with reference to

a contract which left the intention of the parties so much in doubt that the Court was required to determine inferentially from the circumstances surrounding the contract what that intention was. If the opinion went farther than that, or amounted to anything more than the statement of the rule to be applied in the construction of doubtful language in a contract, for the purpose of arriving at the real intention of the parties, it would be clearly opposed to the prevailing rule of law as laid down in the case in *160 U. S., 514*, and other cases before cited and recognized in the Hoyt case itself.

That such was the real scope of the language quoted from this opinion seems to be quite clear from the context as well as from the facts involved in the case.

But the language quoted, even as construed by the Receivers, is not applicable to the contract now under consideration, because here the parties originally declared their intention in the contract in such plain and unmistakable words that there can be no doubt about it, and confirmed it by subsequent declarations in their letters, and also because by their agreed statement of facts (fol. 81), the parties have agreed that Fitch "undertook to forward the lead from New York on or before September 29th and via the Northern Pacific steamer 'Tacoma' sailing from Tacoma October 30, 1894." Thus the parties have expressly determined the scope and meaning of the contract and the door has been closed against any inferential interpretation or deduction by the Court. The contract was and was clearly intended to be a guaranty of transportation to Yokohama by a particular steamer (fol. 113). And in the Hoyt case the Court said (p. 14): "There can be no doubt that a party "may by an absolute contract bind itself to perform things which "subsequently become impossible * * * and such a construction "is to be put upon an unqualified undertaking." And also (p. 11): That the rule that non-performance will be excused by the happening of an event which cannot reasonably be supposed to have been within the contemplation of the parties when the contract was made, would have no application "if the true meaning "and intent of the contract, read, as it should be, * * * in "the light of surrounding circumstances, the situation of the par- "ties and the objects they respectively had in view, was to guar- "antee" performance.

But even with the narrow construction put upon this opinion by the Receivers, it supports our claim.

For it is quite clear, as shown in our previous points, that, when the Receivers made this contract, they distinctly had in mind the possibility that the lead might be excluded from transportation as contraband in view of the war then pending, and they consciously took all that risk. They may not have contemplated the precise day when, or place where, or person by whom such interference might be caused; but they clearly understood the general danger and took the risk of it, whatever it might be and however it might arise.

And indeed it is clear that the risk which they had in mind was that of interference by the United States authorities with the sailing of the ship and not of interference with it after it sailed. Against the latter risk they were presumably protected by insurance. But the stipulation is (p. 17, Finding 8): "Before naming a rate for the transportation of the lead Fitch had expressed some doubt as to whether *it might not be excluded from transportation* as contraband"—not whether its transportation might not be interfered with after the ship had sailed. And in the petition (paragraph 7, page 3) it is alleged, and it is not denied by the answer, that thereupon the "said agent having communicated with the Treasury Department at Washington * * * ascertained that the lead would be allowed to go forward and would not be stopped as contraband."

Thus it appears conclusively that the Receivers did have in contemplation the precise interference which did occur and consciously assumed that risk.

6. The case of *N. Y. N. H. & H. R. R. vs. Baker*, 98 Fed., 694, upon which the decision of the learned Judge at Circuit is based, does not seem to us and did not seem to the Judges of the Circuit Court of Appeals, one of whom rendered that decision, to have any application to this case. That was a case of injury to a passenger while traveling on defendant's train, and the decision was rendered and the statements quoted from the opinion were made with reference to the liability of the defendant as a common carrier, under the general contract of carriage, or for negligence. The negligence, if any, was clearly not that of the defendant or its agents, and the Court properly held that the general contract of carriage did not make it an absolute insurer of the safety of its passengers and that it was not liable for an injury resulting from the carelessness of others outside its property engaged in a work

over which it had no control and for which it was in no wise responsible. If in that case there had been a special express contract, in addition to the common law liability, by which the defendant had undertaken to transport the passenger by a certain time and with absolute safety, the case might have some bearing upon this.

Unquestionably a railroad may make such a contract which will impose a liability upon it in case of failure, and that is what occurred in this case.

The attempt to apply the doctrine of that case to this entirely overlooks the fact that here the Receivers expressly, by special contract, assumed this risk, and ignores the well-settled principle that under such circumstances the carrier is liable, notwithstanding the hardship of being responsible for causes beyond its control because, as many cases say, he might have guarded against it by his contract.

## VI.

### The failure to fulfill the contract was due to the negligence of the Receivers.

The vital importance of prompt transportation and delivery was fully known to the Receivers before they made the contract, and the possibility that the shipment might be excluded from transportation upon the ground that it was contraband of war, had been contemplated by the Receivers, and the risk of such interference had been assumed by them. They made the contract originally with the knowledge of such risk and they reaffirmed it after they had been notified that, in the event of the threatened breach, the Trading Company would ship by steamer "City of Rio," sailing from San Francisco on October 4th, and would charge the Receivers with the difference in the rates. Thus the Receivers assumed the risk and became bound to exercise extraordinary care to insure the through transportation of the shipment in accordance with their contract, particularly as, but for their assumption of this risk, the shipment might have been

forwarded by San Francisco and have reached its destination without interruption.

Had the Receivers taken the precautions and exercised the care which they were bound to exercise in view of their contract and their assumption of this risk, the delay and consequent loss to the claimant would have been prevented. There was ample time between September 19th, when the contract was made, or even September 27th, when the lead was shipped, and October 30th, when the contract required exportation from Tacoma, for the Receivers to arrange to have the lead cleared without the officious and unlawful interference of the Deputy Collector at Tacoma on the latter date. Had they done this the Deputy Collector would have ascertained in time, as he finally did on October 31st, that there was no reason for not permitting the export of the lead, and the interference and delay would have been avoided.

When the Deputy Collector refused to clear the ship on the afternoon of October 30th, and then telegraphed to the Collector for telegraphic instructions, the Receivers should have detained the ship until those instructions were received. Instead of doing this, they permitted the lead to be unloaded and the ship to sail at 9 o'clock on October 31st. On the same day—in fact, within half an hour afterwards—the instructions were received which would have permitted the ship to sail with the lead on board. This was clearly negligence on the part of the Receivers, but for which the injury to the claimant would not have been received.

The Receivers were also clearly negligent in not promptly notifying the Trading Company of the delay in the transportation of the lead. Although they knew, or were bound to know, that the Trading Company was relying upon their absolute contract for the prompt transportation of the lead, and, of course, relying upon them to remove or overcome any obstacles that might occur in the way of such prompt transportation, they not only negligently failed to remove those obstacles themselves, but they also failed to notify the Trading Company, so as to give it an opportunity to do what it could to escape, or minimize, the damages consequent upon the delay. This was clearly negligence upon their part, for which they should be held responsible, if there were no other ground of liability whatever. They knew that the Trading Company was making other shipments of lead by the San Francisco route and had

prompt notice been given this shipment might have been sent the same way.

A delay of three days in giving notice to shippers has been held to be fatal to a carrier's claim to exemption (*"The M. M. Chase," 37 Fed. Rep., 708)*: and in this case six days elapsed before the Trading Company was informed of the delay at Tacoma (p. 22).

The damages which have been suffered by the claimant were those clearly due to the negligent omission of the carriers to exercise that degree of diligence in the interest of shippers which the law requires.

*Hutchinson on Carriers, Secs. 186, 188, 208, 209.*
*Robinson vs. Memphis & Charlston R. R. Co., 16 Fed. Rep., 57, 69.*

Even if the negligence were that of the steamship company, the Receivers, having contracted for through transportation would still be liable.

*Ohio & M. R. Co. vs. McCarthy, 96 U. S., 258.*
*Ogdensburg and L. C. R. Co. vs. Pratt, 22 Wall, 89 U. S., 123.*

## VII.

**The measure of damage is the difference between the contract price for the sale of the lead in Japan and the market price at the date of arrival with interest, as decided by the Court below.**

*"The Caledonia," 50 Fed. Rep., 567; 157 U. S., 124, 139.*
*Schwarzchild vs. Natl. S. S. Co., 74 Fed. Rep., 257.*
*Railroad vs. Estill, 147 U. S., 591, 616.*
*Railway Co. vs. Jurey, 111 U. S., 585.*
*The Nith, 36 Fed. Rep., 86; affirmed, 36 Fed. Rep., 384.*
*Messmore vs. N. Y. Shot & Lead Co., 40 N. Y. 422.*
*Booth vs. Spuyten Duyvil R. M. Co., 60 N. Y., 487-9.*

## VIII.

**The decree of the Circuit Court of Appeals should be affirmed.**

F. B. JENNINGS,
HOWARD VAN SINDEREN,
Of Counsel.

HOWARD VAN SINDEREN,
35 Wall Street,
Solicitor for American Trading Company.

# Supreme Court of the United States.

No. 24.—October Term, 1904.

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| The Northern Pacific Railway Company, Appellant, *vs.* The American Trading Company. | On appeal from the United States Circuit Court of Appeals for the Second Circuit. |

[December 5, 1904.]

The Northern Pacific Railroad Company made a certain mortgage which was foreclosed, and the Northern Pacific Railway Company purchased the property of the former company under the mortgage at the foreclosure sale, and, by the order of the court, the purchaser was required to pay all obligations or liabilities contracted or incurred by the court's receivers, who had been appointed in the foreclosure suit. The American Trading Company, the appellee herein, intervened in that suit, and, by its petition, asked that by virtue of the decree in foreclosure the purchaser, the Northern Pacific Railway Company, be required to pay damages for the failure of the receivers to perform a special contract for the transportation of goods from Newark, New Jersey, to Yokohama, in Japan. The case was tried before the United States Circuit Court in New York city, which dismissed the petition. This decision was reversed by the Circuit Court of Appeals for the Second Circuit, and the railroad company was directed to pay the damages therein stated to the American Trading Company, the intervening petitioner. The railroad company has appealed from such decree or order to this court. The case was tried upon the agreed statement of facts which follows:

1. In September, 1894, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse were receivers of the Northern Pacific Railroad Company, under an order made in a suit bearing the same title as the present suit, in the United States Circuit Court for the Eastern District of Wisconsin, to which this suit is ancillary. Under that order the receivers were authorized to continue, and were continuing to carry on the business of the railroad in their charge.

2. The line of railroad in the possession of the receivers extended from Duluth, Minnesota, to Tacoma, Washington. The receivers had contracts with various carriers reaching points on their line, by which through bills of lading was issued from and to points not upon the line of the receivers' railroad, where the freight passed over some part of that line in transit. Among the carriers with whom the receivers had such arrangements was the Northern Pacific Steamship Company. This was an English company, operating a line of steamers between Tacoma and points in Japan and China, including Yokohama. The contract between the steamship com-

pany and the receivers was the contract originally made on March 30, 1892, between the Northern Pacific Railroad Company and the Northern Pacific Steamship Company, and ratified and adopted by the receivers under the authority of an order of the Circuit Court of the United States, made on September 13, 1893.

The receivers held no stock in the steamship company and had no other express contract relation with the steamship company. This stipulation is not to be accepted as an admission by the railroad company or the receivers or their counsel, that there were any relations between the receivers and the steamship company other than those growing out of the facts herein agreed upon.

For convenience in transacting their freight business in the eastern part of the United States, the receivers maintained an office in the city of New York, which was, in September, 1894, in charge of one George R. Fitch, who was their general Eastern agent, and made arrangements for the transportation of freight over the receivers' line of railway and connections, including transportation to China and Japan.

At the time of the transactions referred to in this statement of facts, the said Fitch had not received, nor did he receive, any direct or independent appointment or authority from the Northern Pacific Steamship Company to act as agent of that company. His only authority as agent of the steamship company was that created by, or arising from, the contract, Exhibit A. Fitch knew that an arrangement had been concluded by the receivers and the steamship company by which contracts for through shipment to Yokohama might be made by the agents of the receivers, and through bills of lading issued, and he had been instructed by the receivers to solicit freight for through transportation upon bills of lading of which Exhibit C, hereto annexed, is a copy; but Fitch did not know the terms of the contract between the steamship company and the receivers, and the Trading Company did not know what company operated the steamships between Tacoma and Yokohama, or that the steamship company was a separate and independent company, or that there was any contract between the receivers and the steamship company.

It is further stipulated that Fitch had no express general authority to make contracts for through transportation, except as provided by the said bills of lading, and no authority to make the contract in question, unless such express authority be found in the telegrams, of which copies are hereinafter set forth; that the American Trading Company did not know the terms of his express authority, and that this stipulation is not to be taken as an admission by the railroad company or the receivers or their counsel that his implied authority was greater than his express authority.

4. The American Trading Company is, and was in September, 1894, a corporation organized under the laws of the State of Connecticut, having its principal office in the city of New York, and carried on a general commercial business with Asiatic ports.

5. In September, 1894, the Trading Company applied to Fitch for a rate upon a proposed shipment of pig lead from New York to Yokohama, Japan, and informed him that it was of vital importance that the lead should be transported promptly and go forward by the earliest possible steamer, without delay, in order to enable the trading company to fulfill a proposed agreement which it was about to make for the sale of the lead in Japan, and which would require its delivery there at a fixed date.

Fitch thereupon named a rate and undertook to forward the lead from New York on or before September 29th and *via* the Northern Pacific steamer "Tacoma," sailing from Tacoma October 30, 1894.

6. Thereupon the Trading Company cabled to its agents at Yokohama, naming a price and a date at which the lead could be delivered there; and thereupon its agents in Yokohama made a contract for the sale of the lead, which contract provided that it should be delivered in Yokohama by overland route, and the most direct connection at San Francisco, Tacoma or Vancouver, and that in case of unusual or extraordinary delay in transit the contract should be null and void. Neither Fitch nor the receivers knew until September 24th that any contract for the sale of lead in Japan had been concluded by the Trading Company, and, except as hereinbefore and hearinafter stated, they never received any information in regard to its terms, as made or proposed. Upon the conclusion of its Japanese contract the trading company purchased two hundred tons of pig lead in bond from the Balbeck Smelting and Refining Company.

7. On September 19, 1894, Fitch, in confirmation of his previous statement, wrote and sent to the Trading Company the following letter:

Northern Pacific Railroad Company.

Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers.

Geo. R. Fitch, general eastern agent, 319 Broadway.

TRAFFIC DEPARTMENT, NEW YORK CITY, *Sept.* 19, 1894.

American Trading Co. 182 Front St. city.

GENTLEMEN: I hereby confirm rate quoted you this day and accepted by you on shipment of pig lead for export to Japan, as follows:

Pig lead, New York to Yokohama, Japan, $15.00 per ton of 2000 lbs., shipment not to consist of less than 400,000 lbs. and to be forwarded from New York on or before Sept. 29th, in accordance with shipping instructions given you by me and to be forwarded from Tacoma, Wash., *via* Northern Pacific steamer sailing from thence October 30th. Kindly forward your acceptance of the above as early as possible. Thanking you for the favor, I remain,

Yours truly,

GEO. R. FITCH,
*G. E. Agent.*

The Trading Company wrote and sent in reply (accepting the proposition) the following letter:

SEPT. 20TH, 1894.

The Northern Pacific R. R. Co., New York city.

DEAR SIRS: In reply to your esteemed favor Sept. 19th, we beg to accept the rate quoted to us in your letter of Sept. 19th, namely, on 200 tons pig lead, N. Y. to Yokohama, Japan, $15.00 per ton of 2000 lbs., shipment not to consist of less than 400,000 lbs., to be forwarded from N. Y. on or before September 29th, in accordance with shipping instructions to be given by you, and to be forwarded from Tacoma, Washington, *via* Northern Pacific steamer sailing from that port Oct. 30th. Kindly let us know as soon as possible the shipping instructions, so that we can forward them to our supplier, and oblige, with best respects,

Very truly yours,

THE AMERICAN TRADING CO.
FRANK P. BALL.

(Signed)

On September 22, 1894, Fitch wrote and sent to the Trading Company the following letter, giving shipping instructions:

Northern Pacific Railroad Company.

Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers.

Geo. R. Fitch, general eastern agent, 319 Broadway.

TRAFFIC DEPARTMENT, NEW YORK CITY, *Sept.* 22, 1894.

American Trading Co., No. 182 Front St., city.

DEAR SIR: I hereby confirm routing given you over the telephone yesterday on your shippment of pig lead for export to Yokohama, Japan, as follows:—To be shipped from Newark, N. J. via Penn. R. R. marked Anchor Line rail and Lake care Northern Pacific care A. O. Canfield, agent N. P. R. R., Tacoma, Wash. Please advise me as soon as possible who the shippers will be that I may order the cars and also see that same are rushed through without delay to connect with our steamer at Tacoma.

Yours truly, GEO. R. FITCH, *G. E. Agent.*
A. H. P.

8. Before naming a rate for the transportation of the lead, Fitch had expressed some doubt as to whether it might not be excluded from transportation as contraband in view of the war then existing between China and Japan. In fact, the shipment of pig lead was not prohibited by the Treasury Department at Washington, during the war between China and Japan, and on September 25th, 1894, the Trading Company made another shipment of pig lead via Pacific Mail steamer sailing from San Francisco, which was, without trouble or delay, transported and delivered in Yokohama.

9. In September, 1894, J. B. Baird was the second assistant general freight agent of the receivers, and J. M. Hannaford was the general freight agent of the receivers; and telegrams of which the following are copies, relating to proposed shipments of pig lead, including the shipment in question, passed between the said Fitch and Baird and Hannaford, but were not disclosed to the American Trading Company::

NEW YORK, *September* 14, 1894.

J. B. Baird, second A. G. F. A.:

Please wire quick lowest rate one hundred ton lots pig lead from Chicago and Duluth to Yokohama.

GEO. R. FITCH.

SEPTEMBER 14, 1894.

Geo. R. Fitch, 319 Broadway, New York, N. Y.:

You may quote as low as sixty cents from Duluth and seventy cents from Chicago to Yokohama on pig lead in one hundred ton lots. Get more if possible.

J. B. BAIRD.

SEPTEMBER 17, 1894.

New York, September 17, 1894.

J. B. Baird, 2d A. G. F. A.:

Your wire fourteenth. Shall I accept fifty cents on pig lead Duluth to Yokohama. Also name lowest rate on two hundred tons St. Louis to Yokohama.

GEO. R. FITCH.

SEPTEMBER 18TH, 1894.

Geo. R. Fitch, 319 Broadway, New York.

Cannot accept less than sixty cents on pig lead Duluth to Yokohama. Will quote from St. Louis later.

0.900. J. B. BAIRD. WDB.

SEPT. 19TH, 1894.

G. R. Fitch, 319 Broadway, New York:

You may quote seventy cents on the pig lead in one hundred ton lots St. Louis to Yokohama. Advise if accepted.

0.900. J. B. BAIRD. WDB.

NEW YORK, *September* 21, 1894.

J. B. Baird, N. P. R'y, St. Paul, Minn.:

Wire best rate two hundred fifty tons pig lead Duluth to Shanghai.

GEO. R. FITCH.

SEPTEMBER 22, 1894.

G. R. Fitch, 319 Broadway, New York:

N. P. Steamship Co. have now declined to handle lead for Yokohama, Kobe, Hong Kong or Shanghai. Please cancel your quotation.

0.900. J. B. BAIRD. WDB.

On September 24, 1894, Fitch informed the Trading Company that he declined to ship the lead upon the ground that it might be contraband of war, and thereupon on the same day the trading company wrote him a letter stating that they would hold his company responsible for any loss from failure to fulfill the contract, which letter is as follows:

SEPT. 24TH, 1894.

Geo. R. Fitch, Esq., general eastern agent N. P. R. R., No. 319 Broadway, city.

DEAR SIR: Respecting your notice just received by us through your Mr. Post, that your company now decline to ship for us via Tacoma the 200 tons of pig lead specified in your contract with us under date Sept. 19th, and confirmed by us under date Sept. 20th, we beg to advise that we shall hold your company responsible for any loss or damage we may suffer from the non-fulfilment of this contract with you.

We remain, dear sirs,

Very truly yours,

THE AMERICAN TRADING CO.

(Signed) WM. H. STEVENS, *Treas.*

Thereupon, telegrams of which the following are copies were sent and received as indicated, in relation to the shipment in question, but were not disclosed to the trading company:

NEW YORK, *Sept.* 24, 1894.

J. B. Baird, N. P. R'y, St. Paul, Minn.:

Shipment lead to Yokohama is now being made shippers refuse to accept withdrawal, we have given shippers written contract.

GEO. R. FITCH.

NEW YORK, *Sept.* 24, 1894.

J. M. Hannaford, N. P. R'y, St. Paul, Minn.:

Have notified American Trading Co., that shipment will be refused. They state they will hold us to contract. They are shipping hundred tons from Denver to Yokohama by steamer City of Rio from San Francisco, Oct. fourth and expect to forward this shipment same way, will charge us difference in rate. Advice quick.

GEO. R. FITCH.

SEPT. 25, 1894.

G. R. Fitch, 319 Broadway, New York:

Your wire this date to Mr. Hannaford: Dodwell, Carlill & Co. have consented to accept the lead already contracted. Do not contract for any more. Advise quick number of pounds contracted by you and say how it will be routed. Think we should receipt for lead subject to delay. 0/900.

J. B. BAIRD. WDB.

Dodwell, Carlill & Co., mentioned in the last telegram, represented the steamship company.

10. Thereupon the refusal to accept the shipment was withdrawn, and the shipment was made under the contract, and the lead, consisting of two hundred tons, was, in accordance with the shipping instructions given in Fitch's letter of September 22, 1894, shipped at Newark, New Jersey, on September 27th, 1894, by the Balbeck Smelting and Refining Company for the account of the American Trading Company. This was the first shipment ever made by the American Trading Company over the line of the Northern Pacific Railroad Company and its connecting carriers. The shipment was made in bond for exportation at Tacoma, and was secured upon the cars by Government locks and customs seals. On the afternoon of September 27, 1894, the shipment left Newark, and started on its journey, and was transferred via the Anchor Line, a carrier operating between eastern points and points on the Lakes, to Duluth, and carried from Duluth via the receivers' railroad to Takoma, which it reached in time for shipment by the steamship company's steamer, "Tacoma," sailing October 30, 1894. On September 28th, a cheque for the freight upon the lead from Newark to Yokohama was handed by the trading company to Fitch, of which cheque, with its endorsements the following is a copy:

*Cheque.*

NEW YORK, *Sept* 28", 1894. No. 6096.

The National Bank of North America.

Pay to the order of the Northern Pacific R. R. $3360.05. Thirty-three hundred and sixty & 05/100 dollars.

THE AMERICAN TRADING CO.
WM. H. STEVENS, *Treas'r.*

A. PROCTOR, JR.,
*Cashier.*

The American Trading Co.

Endorsements.

For deposit in
Ninth National Bank
to Cr. of Geo. R. Fitch,
Gen. east'n ag't.
Ninth Nat'l Bank,
Endorsement,
guaranteed
of the City of N. Y.

The amount of the cheque was credited at the Ninth National Bank to the account of "George R. Fitch, General Eastern Agent," which was the style of the account opened by Fitch as agent of the Northern Pacific Railroad; and the account was never drawn upon in favor of the Northern Steamship Company, but all through freights received were deposited to the credit of this account and remitted to the railroad company, or its receivers, and were divided and distributed by them under their contract with the steamship company.

II. On September 28, 1894, a shipping receipt for the shipment was issued to the Balbeck Smelting and Refining Company, of which shipping receipt a copy is hereto annexed marked Exhibit "B," and was delivered by the Balbeck Smelting and Refining Company to the American Trading Company, and was forthwith surrendered by the trading company to Fitch.

A bill of lading in the usual printed form, a copy of which is herein annexed marked "C," was subsequently issued by Fitch to the American Trading Company. It was received by a clerk of the trading company without stated objection to its terms, but was not read or examined by him or by any officer of the company, and was immediately hypothecated with the Hong Kong and Shanghai bank, as collateral security for moneys borrowed thereon by the Trading Company. The original of the bill of lading was negotiable, and did not have stamped upon it the words "not negotiable, shippers copy," which appear on the shipper's copy hereto annexed, but was similar to the shipper's copy in all other respects.

On September 29th, 1894, Fitch sent a copy of this bill of lading to Dodwell, Carlill & Co., with a letter (not disclosed to the American Trading Company) of which the following is a copy:

Northern Pacific Railroad Company.

Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers.

George R. Fitch, general eastern agent, 319 Broadway.

TRAFFIC DEPARTMENT, NEW YORK CITY, *Sept.* 29, 1894.

Dodwell, Carlill & Co., Tacoma, Wash.

GENTLEMEN: I hand you herewith my B/L 1507 covering shipment of pig lead for export to Amer. Trading Co. Yokohama, Japan. As I have previously advised you, I have made contract guaranteeing delivery of this supplement at Yokohama by our S. S. Tacoma sailing Oct. 30th. Will you kindly see that this connection is made without fail.

Yours truly,

(S'g'd) GEO. R. FITCH, *G. E. A.*

The previous letter of advice referred to by Fitch in the foregoing letter is lost and no copy of it exists. It appears, however, from the following letter of acknowledgment to have borne date on September 27th :

TACOMA, WN., *October 2nd*, 1894.

George R. Fitch, Esq., G. E. A., N. P. R. R., 319 Broaday, New York.

DEAR SIR: We beg to own receipt of and thank you for your favor of the 27th ultimo, and advising the engagement of 40 tons of condensed milk and 225 tons of pig lead for our steamer "Tacoma," sailing hence the 30th instant. Please keep us frequently advised of freight engagements, as we have applications now for more space for flour than our steamers will carry, and we are shutting out considerable of the latter every voyage.

Yours truly,

(Sig.) *p. p.* DODWELL, CARLILL & Co.
A. T. PRITCHARD.

12. At Tacoma the lead was delivered by the receivers to the Northern Pacific Steamship Company and was loaded upon the "Tacoma," the vessel of the steamship company which was to sail on October 30th; but about four o'clock in the afternoon of that day the deputy collector of the United States at that port refused to clear the vessel while the lead was on board upon the ground that it was contraband of war, and telegraphed to the collector of Port Townsend for instructions. On the following day, which was the 31st of October, the deputy collector at Tacoma received a telegram from the collector of the United States at Port Townsend, which was as follows:

"Department advises that unless you have evidence tending to show that the pig lead at Tacoma and referred to in your telegram of yesterday is to be used in the war between China and Japan, no reason is perceived why shipment should not be permitted."

In the meantime, however, the master of the vessel unloaded the lead, which delayed the ship until 9 a. m. on the morning of October 31st when he sailed without it.

The petitioner was not notified of the delay in the transhipment of the lead until November 5th, 1894.

The next vessel on the line was the "Sikh," which did not belong to the steamship company, but was a chartered ship. Her captain declined to take the lead on the ground that it was contraband. The Northern Pacific Steamship Company cabled to the owners of the vessel in London, and they adhered to the position taken by the captain.

13. The lead went forward on the next vessel, the "Victoria," on December 11, 1894, and did not arrive in Yokohama until on or about January 4, 1895, instead of on or about November 18, 1894, when it would have arrived had it gone forward on the 30th of October, 1894.

14. In the meantime hostilities between China and Japan had ceased, the price of lead had fallen very considerably, and the purchaser of the shipment refused to accept it and declared the contract null and void in consequence of the failure to deliver it promptly in accordance with the terms of the contract.

15. The price of the lead under the contract would have been $38,610.17. The lead was delivered to the trading company in Yokohama upon the surrender of the bill of lading, and in consequence of the failure of its

vendee to accept the lead, the trading company sold it for $11,331.60, which was the best price obtainable therefor, at the time of the sale. The sale was made as soon as a purchaser could be found. The value of the lead on January 4, 1895, in Japan, was $11,906.16.

16. Upon the case arising on the foregoing facts, the American Trading Company has duly presented to the receivers and to the Northern Pacific Railway Company, its claim amounting to the sum of $26,704.02, with interest thereon from the 4th day of January, 1895, and has demanded payment thereof, but payment has been refused, and no part thereof has been paid.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

The objections to the recovery, herein made on the argument, were—

(1.) That no contract was shown on the part of the receivers to assume any responsibility for the transportation of the lead beyond the line of the railway in their charge.

(2.) That there was no proof that the court had authorized the receivers to assume any such responsibility, and they could not do so without any such authority.

(3.) That if Fitch, the agent, made such agreement it was not within his authority, real or apparent.

(4.) That the bill of lading is the controlling contract, and by its terms the receivers were not liable beyond their own line.

(5.) That the damages were caused solely by the act of the collector, representing the authority of the United States, and the receivers are not liable for damages so caused.

In regard to the first objection, we think the facts agreed upon clearly show a special agreement for the transportation of the lead to Yokohama by the steamship of the Northern Pacific Steamship Company, which was to leave Tacoma on the 30th of October, 1894. The opening of the negotiation was made by the American Trading Company, which applied to Fitch for a rate upon the proposed shipment from New York to Yokohama, Japan. The Trading Company knew nothing of his steamship agency, and he was informed that it was of vital importance that the lead should be transported promptly and go forward by the earliest possible steamer without delay, in order to enable the Trading Company to fulfill a proposed agreement which it was about to make for the sale of the lead in Japan, and which would require its delivery there at a fixed date. Fitch thereupon named a rate, and undertook to forward the lead from New York to Yokohama, on or before September 29, *via* the Northern Pacific steamer sailing from Tacoma October 30, 1894. The Trading Company thereupon made its proposed agreement through its agents at Yokohama. Although Fitch, the agent, was not thereafter specially informed of the fact

that the proposed agreement had been made, yet he was informed that the company intended to make it if a rate could be agreed upon for the transportation of the lead, it is clear that his furnishing of the rate was with reference to the proposed agreement, and that he understood that if his terms were accepted he was entering into an agreement to transport to Japan the lead in question over the Northern Pacific Railroad to Tacoma, and by the steamship which would leave Tacoma on the 30th of October, 1898. His letter of September 19, 1894, to the Trading Company, confirming the rate, is a plain agreement, not alone to deliver the lead in time for the sailing of the steamer, October 30, but an agreement that the lead should be forwarded from Tacoma, Washington, *via* the Northern Pacific steamer sailing on that day. Fitch in that letter asked the Trading Company to forward their acceptance of this proposed agreement as early as possible. On the next day, September 20, the Trading Company, by letter, did accept the rate "for a shipment of pig lead, to consist of not less than four hundred thousand pounds, to be forwarded from New York to Tacoma, and from Tacoma *via* the Northern Pacific steamer sailing from that port October 30." There is no doubtful expression in these letters. They form a clear and specific contract. It is entirely different from *Myrick* v. *Michigan Central Railroad Company*, (107 U. S. 102.) The receipt in that case was plainly not one which established a contract for transportation on the part of the railroad company (defendant) beyond its own line. This court held that while a company might by a contract to that effect be held liable for the transportation and delivery of freight beyond its own line, yet the contract to do so must be clear, and that the mere stating of a through fare on the receipt of the freight does not establish such contract or liability.

In the case at bar we hold that a special agreement is set forth in the statement of facts, to forward to Yokohama by the steamer leaving Tacoma on October 30, 1894. If it had been made by the proper officer of a railroad company in the general course of business, we have no doubt, under the authorities, of the validity of the contract. (*Railroad Company* v. *Pratt*, 22 Wall. 123; *Railway Company* v. *McCarthy*, 96 U. S. 258; *Myrick* v. *Michigan Central Railroad Company*, 107 U. S. 102.) Whether the fact that it was made by an agent of the receivers of a railroad company makes any difference will be discussed later.

Appellant urges, however, that as Fitch was also agent for the steamship company, his contract, if there was one, to forward by the steamship sailing October 30, was in behalf of the steamship company. Fitch had never received any direct or independent appointment or authority from the Northern Pacific Steamship Company to act as its agent. His only authority as agent of that company was created by the contract made between the two companies. By that agreement the railroad company was to have the exclusive right (with certain exceptions) to appoint agents in

the United States, etc., and the steamship company thereby authorized the railroad company and its appointed agents to act as agents for the steamship company, and to issue bills of lading and passenger tickets, and to make and name rates on all traffic for Asiatic points, etc. The Trading Company did not know what company operated the steamships between Tacoma and Yokohama, or that the steamship company was a separate and independent company, or that there was any contract between the receivers and the steamship company. When the Trading Company, therefore, applied to Fitch for a rate, they applied to him as the agent of the receivers of the railroad company. The letter of Fitch of the 19th of September, confirming the rate already given orally that day, is written on the paper used by the receivers of the railroad company, which paper is headed by the names of the receivers under the words "Northern Pacific Railroad Co.," and in it Fitch describes himself as "general eastern agent," and his department as the "Traffic Department in New York City," and he signs his name and adds the words "G. E. Agent." In his letter of September 29, 1894, to the steamship agent at Tacoma, Washington, he writes on the same kind of paper, with the same heading, and describes himself as "general eastern agent," and in the letter he says "As I have previously advised you I have made contract guaranteeing delivery of this shipment at Yokohama by our S. S. Tacoma sailing October 30. Will you kindly see that this connection is made, without fail." He signs his name and adds the letters G. E. A., meaning, of course, thereby "general eastern agent." It is contended that by the statement of facts it appears that Fitch was acting for two principals, and that the plaintiff must establish that Fitch made the alleged guaranty on behalf of the receivers. We do not think he was acting in behalf of two principals. From all the facts we think it plain that he was acting for the receivers of the railroad company. He was their general eastern agent; he was applied to and he made his rates as such, and as such he signed the letter confirming those rates and containing the agreement to forward the lead on the steamship as already stated. Subsequently, and on the 29th of September while acting and signing himself as the general eastern agent of the receivers, he writes to the steamship agents at Tacoma the letter in which he says he has guaranteed delivery at Yokohama by our steamer sailing October 30. All this shows the fact that he was acting as agent for the receivers.

We have no difficulty in determinining the capacity in which Fitch acted, nor that he made the special agreement, as contended by the Trading Company.

(2.) Neither do we doubt that the court had authorized the receivers to make such a contract.

Under the modern methods of foreclosing railroad mortgages it has been the custom to appoint receivers to take charge and conduct the business of

the railroad mortgagor, during the pendency of the suit. The possession of such receivers frequently lasts for years It would be in the highest degree disadvantageous to all interested in the railroad company, as well as to the public having occasion to do business with it, if the same power which the company possessed to make special contracts for transportation should not be given to and exercised by the receivers of the company in continuing to run the road in substance as a going concern, so far as these kinds of contracts are concerned. Such contracts are not of the character spoken of by Mr. Justice Jackson in *Chicago Deposit Vault Company* v. *McNulta*, (153 U. S. 554), as so extraordinary or unusual as not to be included in the authority to carry on the business of the company. On the contrary, this contract is one of that class which we regard as so included.

(3.) We are also of opinion that Fitch had the right to make the agreement in question, and if there could be any doubt on that point, nevertheless the agreement was in fact thereafter ratified by the officers representing the receivers, who had power so to do. (*Goodrich* v. *Thompson*, 44 N. Y. 324.)

A railroad company has the power, as we have seen, to make such a contract of carriage beyond its lines. A general agent would be presumed to have such power. If the company have the power some individual must exercise it. It would not be supposed that the board of directors would be consulted and authority given by it every time such a contract was to be made. Who is a more proper or fit person to make the contract than the general agent of the company? He must necessarily have large powers in order to conduct the business of his office, and, *prima facie* such power is within the scope of such agency. When the railroad company passes into the hands of a receiver, appointed by the court in a foreclosure suit, and the receiver is directed to conduct and continue the business of the company, the power to appoint general agents necessarily goes with the order to conduct the business of the company, and when the general agent is appointed by a receiver he will be presumed to have the general powers of such an officer when acting for the railroad itself. The words "General Eastern Agent" for a Western railroad company, only limit the exercise of the agency to the place so described.

(4.) It is urged that the bill of lading constitutes the sole contract. But there was a plain valid contract existing between the parties before the lead was shipped and before any bill of lading was issued. That special contract was to forward the lead by the steamship leaving Tacoma on the 30th of October. The next day after the lead was shipped at Newark, a bill of lading was delivered to one of the clerks of the Trading Company, and that bill of lading contains the absolutely inconsistent statement that the carrier is not to be liable for any loss not occurring on its

own road, and that the contract as executed is accomplished and all liability thereunder terminates upon the delivery of the property to the steamship.

It is said that the Trading Company, by receiving this bill of lading and obtaining money on it as the representative of the property therein described, has acquiesced in the total abolition of the special contract the company made with Fitch, and has agreed that the railroad company shall be under no liability after the delivery of the lead to the steamship.

We regard it as entirely clear that no such effacement of the original contract was meant by the receipt of the bill of lading. The railroad company had no power alone to alter that contract, and it could not alter it by simply issuing a bill of lading, unless the other party assented to its conditions and thereby made a new and different contract.

At the time when the bill of lading was issued the lead had been shipped at Newark and had departed for its destination. It was impossible for the Trading Company to recall it. The particular conditions in the bill are set out in subdivision three and subdivision twelve of the conditions printed in small type and they form part of numerous other printed conditions in regard to the freight received.

Where the acceptance of the bill of lading, under these circumstances, is sought to be made an equivalent to an assent to the change of contract, it is proper to look at these facts in order to determine what weight should be given to such acceptance. At the time it was received the lead was out of the possession of the Trading Company, on its way West. That company needed the bill of lading as evidence of title to the property described in it, upon the security of which it desired to raise money, which it could not do without the possession of the bill. Under these circumstances we refuse to hold that the Trading Company, in accepting the bill of lading, thereby consented to the complete alteration of its original contract, and, without any consideration whatever, agreed to release the railroad company from all liability on that contract and to take in its stead the reduced liability provided for in the bill of lading.

Of course the company expected a bill of lading, for such an instrument is the usual accompaniment in shipping merchandise. The bill showed the amount of the lead, the marks and numbers, etc., and so identified the goods as to enable the shippers to show their amount and general value, and to enable them to negotiate the bill and obtain money on its security.

It is agreed in the statement of facts that this bill of lading was received by a clerk of the Trading Company without stated objection to its terms, but was not read or examined by him or by any officer of the company, and was immediately hypothecated with a bank as collateral security for the money borrowed thereon by the Trading Company. We do not

state the fact that the bill of lading was not examined, for the purpose of insisting that an examination of such an instrument must always be shown before a contract can be predicated thereon. But where there is a valid contract already in existence, and it is urged that such contract has been abrogated or changed by the receipt of a bill of lading, after goods have passed from the control of the shipper, we think it is important, upon the question of whether such original contract has, in fact, been abrogated, to show that the bill was never read in fact; that the conditions abrogating the original contract were among a number of other conditions printed in the bill in smaller type than the rest of the bill, and that the alleged acquiescence of the Trading Company in the change of the contract, by virtue of these conditions, is based upon the mere reception of the bill of lading by a clerk without any knowledge of the existence of these conditions and without evidence of any authority in him to consent to a modification of the contract already made by his employer. The fact that, in such ignorance, that company hypothecated the bill of lading, adds nothing to the alleged acquiescence. What the contract meant as between the railroad company and the bank or other assignee of the bill of lading is not important here, but upon these facts we are unable to see that the receipt and holding of the bill of lading changed the original contract as claimed by the railroad company. See *Bostwick* v. *Railroad Company*, (45 N. Y. 712) where it was held, under the circumstances of that case, the mere acceptance of a bill of lading did not alter a previously made oral contract in relation to the shipment.

(5.) Even if the receivers of the railroad company contracted to forward the lead by the steamer sailing from Tacoma, October 30, it is still insisted that the action of the deputy collector, at Tacoma, in refusing to grant a clearance to the steamship while the lead was on board, made the performance of the agreement not only impossible but unlawful, and for that reason the receivers were absolved from their agreement to forward by that vessel. The contract was not unlawful when made. It may be assumed that the lead was contraband of war, but that fact did not render the contract of transportation illegal nor absolve the carrier from fulfilling it. It is legal to export articles which are contraband of war, bnt the articles and the ship which carries them are subject to the risk of capture and forfeiture. (*The Santissima Trinidad, and the St. Ander*, 7 Wheat. 283, 340.) Neither any law of the United States nor any provision of international law was violated by the making of this contract, nor by an attempt to export the lead pursuant to its provisions. The case does not come within the principle of *Brewster* v. *Kitchell*, (1 Salk. 198,) where it was said that if one covenants to do a thing which is lawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed.

No act of Congress was passed, subsequently to the making of the contract, which made it unlawful, and it was lawful when made. It is true that the sailing of the vessel without a clearance would have been unlawful, and the deputy collector refused to grant that necessary document while the lead was on board the steamship. But that did not render unlawful the contract to transport. He had the power to refuse to grant the clearance, and he did refuse unless the lead were taken off. In so doing he undoubtedly violated his duty. He was not justified in exacting any such condition for granting the clearance.

Upon the facts in this case we are of opinion that this refusal of the deputy collector constituted no defense to the action on the contract. It is not within the exception referred to by Mr. Justice Jackson, in delivering the opinion of the court in *Chicago, Milwaukee & St. Paul Railway Company* v. *Hoyt*, (149 U. S. 1.) This contract, in view of all the facts, we think was made in contemplation of trouble arising from the character of the lead as contrabrand of war.

The statement of facts shows that the question of whether the lead might not be excluded from transportation as contrabrand in view of the war then existing between China and Japan, was fully understood before the contract was made, and after it was made and the steamship refused to carry the lead, the Trading Company, upon being so informed by Fitch, notified him that they would hold the receivers responsible for failure to fulfil the contract, and thereafter, with the attention of all the parties directed to the subject, it was finally agreed that the lead should be received and transported, and the refusal was then withdrawn.

It is true that the special and particular difficulty was first made by the steamship company which refused to transport the lead, yet, still, the attention of all the parties was, from the very first, directed to the peculiar character of the freight as contrabrand of war, and whether the contract should on that account be made, or, having been made, whether the shipment should not be refused. The receivers, therefore, knew that there might be difficulty in relation to the transportation, and yet, after full knowledge on the subject, they agreed to and did withdraw their refusal, and they thereupon took the lead for transportation under the contract.

Under these circumstances it ought not to be held that the mistaken action of the deputy collector in refusing to give the clearance should operate as an excuse for the non-performance of the contract, which was not thereby rendered illegal. It cannot be affirmed that such possible refusal was not within the contemplation of the contracting parties when the contract was made. Many causes, it was known, might operate to obstruct the transportation of articles contraband of war. This particular form of impediment may not have been actually within the minds of the parties to the contract, but there was, as the agreed facts show, present to

their minds the fact that there might be trouble in procuring the transportation of the lead, because of its character as contraband of war, and in the light of those facts the contract was made and, in substance, ratified after it was made. The railroad receivers took the risk of this, as of other obstructions, in making the contract, and they ought to be held to it.

As the act of the deputy collector was an erroneous one and a clearance should have been given while the lead was on board the steamship, we think his refusal should not be at the expense of the shippers who had obtained this contract for transportation while all parties actually knew the difficulties that might concern the exportation of the lead from Tacoma. The State had not intervened to prevent the performance of the contract, as was the case in *Touteng* v. *Hubbard*, (3 B. & P. 291,) where Lord Alvanley held that in such circumstances the party will be excused. In that case there was an embargo laid by the British Government after the contract was made, on all Swedish vessels.

Here there was no intervention of the Government of the United States. The exportation of lead was never prohibited by the Treasury Department during the war between China and Japan. There was no change in the law or the policy of this Government subsequently to the making of the contract, by which its performance was excused. The exportation of the lead was legal when the contract was made and, continued to be so after the execution of such contract, although the deputy collector mistakenly refused to grant the clearance unless the lead was taken off the vessel. Such mistaken decision did not render the original loading of the lead on the ship unlawful, nor would it have been unlawful for the ship to proceed with the lead on board provided the clearance had been had. It was not an act of the State, therefore, which prevented the sailing of the vessel within the true meaning of such a term, but a mistaken act of a subordinate official not jusitified by law and not sufficient as an excuse for the non-performance of the contract in question under the circumstances already detailed. If the bill of lading were regarded as applicable for this purpose, the refusal of the clearance did not constitute a "restraint of princes, rulers or people," within that clause of the bill.

It was one of the contingencies of which the receivers undertook by their special contract of transportation to take the risk. It was not a contract that they should violate the law, but they took the risk of its misapplication, believing, of course, that such contingency was most remote and that if the steamship company would receive the lead for transportation the chief obstacle to the fulfilment of the contract would be thereby removed.

After the lead had been unshipped, and within half an hour after the sailing of the vessel, the telegram which the deputy collector had sent to the collector in regard to the matter was answered by the latter in such terms that, undoubtedly, if the ship had been still in port, the lead would

have been placed thereon and transported to Japan. The master, however, as soon as the determination of the deputy collector was given, immediately and without appealing to the collector, unshipped the lead and sailed for his destination at once. The result of the failure thus to carry the lead on that vessel was that it did not arrive in Yokohama until on or about January 4, 1895, instead of on or about November 18, 1894, which it would have done had it gone forward as contracted for. In the meantime, the war between China and Japan ceased, the value of the lead fell, and the Trading Company was damaged as stated in the finding of facts.

We think the objections made to this recovery are untenable, and the decree of the court below is, therefore,

*Affirmed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*